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Wisconsin. Supreme Court

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148

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

JANUARY 9 — MARCH 12, 1912

FREDERIC K. CONOVER

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME

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ROBERT G. SIEBECKER
JAMES C. KERWIN
WILLIAM H. TIMLIN
JOHN BARNES
AAD J. VINJE

Attorney General - - LEVI H. BANCROFT

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IN MEMORIAM.

JOSEPH V. QUARLES.

On the 9th day of January, 1912, Mr. T. W. Spence of Milwaukee addressed the court and presented the following report and memorial:

To the Milwaukee Bar Association:

The committee appointed by the Milwaukee Bar Association for that purpose herewith present a brief memorial of the life and services of the late JOSEPH V. QUARLES, whose death occurred at the city of Milwaukee, Wisconsin, October 7, 1911.

Memorial of the Milwaukee Bar Association.

JOSEPH V. QUARLES was born in Southport, now Kenosha, on December 16, 1843. His father was one of a colony that came to the Territory of Wisconsin from Western New York shortly before the birth of JOSEPH V., and settled in Southport.

When the Civil War broke out, Mr. QUARLES was a student in the Kenosha high school, and of the age of seventeen years. Refused permission by his father to enlist as a soldier, he formed a military company among the high school boys, known as the "Union Cadets," and was elected captain of the company. He studied military tactics and applied them personally in the drilling of his company. The company was uniformed, armed with double-barreled shotguns, and became one of the best drilled companies in the state. Captain QUARLES was employed thereafter to drill practically all of the soldiers recruited in Kenosha county for the war. When the 39th Wisconsin Infantry was organized as a one-hundred-day regiment, he procured the consent of his father to his enlistment as a private for that period. On the completion of the organization of the company he was chosen lieutenant and went south with the company to Memphis, Tennessee. He was there when General Forrest made his raid through Western Tennessee, and at the end of his term of service returned to Kenosha, hoping to reorganize his company and return to active service. His father, however, insisted that he should go to the University of Michigan to finish his education. While at the university he again obtained his father's consent to join the army and, returning to Kenosha on a freight train, enlisted as a private, and remained until the end of the war.

Joseph V. Quarles.

Mr. QUARLES graduated from the University of Michigan in 1866, and thereafter attended the law school of that university for an additional year. He was admitted to the bar in the year 1868, and immediately formed a partnership with O. S. Head, at Kenosha, one of the leading lawyers in that part of the state. This partnership was terminated by the death of Mr. Head in 1875.

During six years of this period he served as district attorney of Kenosha county, was elected mayor of Kenosha in 1876, and was president of the school board of that city for two years.

His first advent into state politics was in the year 1879, when he was elected a member of the Assembly for the Kenosha district. In the fall of 1880 he was chosen State Senator for the district consisting of Kenosha and Walworth counties.

Shortly after the expiration of the legislative session of 1881 he formed a partnership with JOHN B. WINSLOW, now Chief Justice of the Supreme Court, which partnership was terminated in about a year thereafter by the election of Judge WINSLOW to the circuit bench of the first circuit.

In the year 1884 he formed a partnership with T. W. Spence of Fond du Lac, into which partnership J. R. Dyer, now assistant counsel of the Northwestern Life Insurance Company, was taken in the year 1887.

In the year 1888 the firm of Quarles, Spence & Quarles was formed, composed of Judge QUARLES, his brother, Charles Quarles, recently deceased, and Mr. Spence. The firm was organized with the understanding that it should locate at the city of Milwaukee, which it did in the latter part of the year 1888.

Prior to his removal to Milwaukee Judge QUARLES had established a state-wide reputation as an eminent trial lawyer in both civil and criminal cases, and had taken the leading part in some of the most important, interesting, and difficult cases in the records of the jurisprudence of the state, the demand for his services not being limited to the First circuit, but covering almost every circuit in the state, including the city of Milwaukee. While his fame as an all-round lawyer was state wide, his eminence as a *trial* lawyer was more fully recognized throughout the First circuit. During the last ten years of his residence in that circuit no trial, civil or criminal, of great importance was had without Mr. QUARLES appearing as leading counsel on one side. Perhaps the most universal and keenest appreciation of his skill in the trial of cases was found among the people of Walworth county. At every general term of that circuit when it was known that Mr. QUARLES was to take part in a trial of an important jury case, the court room was filled to its utmost capacity with people, not only from the county seat but all over the county.

His urbane but effective cross-examination of witnesses, his orderly and logical conduct of the trial, and particularly his magnetic oratory in his addresses to the jury, made him what might be properly characterized as a "stage idol" of that whole section of the country.

From the time of his coming to Milwaukee up to his election as United States Senator he was constantly engaged in the trial and preparation for trial of many cases of great magnitude and importance. More than one hundred volumes of the Wisconsin Reports bear tribute not only to the high position which he held with clients having great interests at stake, but also to the masterly manner in which he handled all litigation entrusted to him at all stages.

While a member of the State Senate in 1881, towards the end of a long contest over the selection of a Senator, Mr. QUARLES, though positively refusing the use of his name as a candidate, came within a few votes of being chosen a member of the United States Senate.

In 1899 that distinguished honor came to him, and on the 4th of March of that year he assumed the duties and responsibilities of the office.

At the expiration of his Senatorial term, at the urgent solicitation of President Roosevelt, Senator Spooner, and numerous close personal friends, he consented to accept the position of United States judge for the Eastern district of Wisconsin, which he continued to hold until the time of his death, winning the respect and confidence of the bar and the public by his learning, his integrity, and his sound judgment.

The Judge was a man of agreeable manners, of kind heart and marked social tastes, and enjoyed the respect and good will of all who knew him. His remarkable oratorical gifts always ensured him full houses and enthusiastic listeners.

As a Senator of the United States he was under the restraint which handicaps all new Senators. He served on important committees and rendered valuable service in the investigations required of such committees. The few speeches he made attested his ability to command the attention of the Senate and to meet the expectations of his admiring friends. His Senatorial career, though brief, was creditable alike to his ability and his devotion to the public interests.

Judge QUARLES was always a man of high ideals, an enthusiastic American citizen, an ardent champion of our liberal institutions, and a friend of every agency for promoting morality and good government. He was a devoted husband and a kind and loving father and a loyal friend. He was fitted by nature and education for the large place he filled in the community, and it is only natural that his departure should be widely and sincerely lamented.

Joseph V. Quarles.

Your committee recommend that the foregoing memorial be adopted and spread on the records of our Association; and the president of our Association be directed as soon as practicable to ask to have the same spread on the records of the Supreme Court of Wisconsin, United States court for the Eastern district of Wisconsin, and of the circuit court of Milwaukee county; and that a copy of the same be forwarded to the family of the deceased.

T. W. SPENCE.
F. C. WINKLER.
G. W. HAZELTON.

Mr. Spence then spoke as follows:

May it please the Court:—In presenting this memorial I cannot forbear adding a few words concerning Judge QUARLES from a personal standpoint. For more than twenty years his partner, for more than thirty-five his familiar friend, I knew him well, in private and public life, in professional and political service, nearer to me over a longer period of time than any brother of the flesh.

The mainspring of his career in every department was his sentiment and his affections. He loved his family, his friends, his profession, literature, oratory, and his country.

Endowed by nature with a splendid physique, developed and maintained by manly exercise and sport, temperate and regular living, he had the foundation and equipment for high accomplishment, impelled and inspired by his sentimental nature.

It was his sentimental nature that was the pure and perennial source of that outflow of eloquence with which he so often delighted his hearers, and which supplied the personal magnetism which accompanied all of his public utterances.

Practically from the beginning of his career he was distinguished above all others in his part of the state as a jury lawyer. The amount of trial work which he did while he remained in active practice was prodigious.

In two features of the trial lawyer he was peculiarly skilful, namely, the cross-examination of witnesses, and in addresses to the juries.

His thoroughness in the preparation of cases for trial, and particularly of the law, was not fully known save to those who were closely associated with him professionally. He never went into the trial of an important case without having a carefully prepared statement of facts, a summary of the testimony of each witness, as well as memoranda upon the character, record, nationality, and religion of both witnesses and jury; of the one, with reference to their truthfulness, and of the other with reference to their possible bias or prejudice. He likewise had a trial brief covering every question of

law likely to arise at *nisi prius*, prepared with such care that on appeal to the Supreme Court it was almost in shape for use in a printed brief in that court. He never failed to prepare what he called an "order of proof" or a "trial program," in which each step to be taken in the case, including the selection of venue, choice of jurors, order of examination of witnesses, instructions to be asked, and argument to the jury, was outlined.

In the matter of public speaking his addresses were prepared in a way of his own. He never committed a speech to memory, and yet I never knew him to deliver a public address by appointment that was not written out in full in advance of delivery. He did not take his manuscript to the platform, nor read from it, nor refer to it. The writing was done with the purpose of perfecting the form, order, and expression, and to accurately define in his own brain his propositions, arguments, and the embellishments which were an invariable part of his formal addresses. His powerful memory and agile mental qualities while on his feet served for the rest.

He went upon the bench at the age of sixty years with some reluctance on account of his keen desire to enter again the arena in which he had so often triumphed, but it was more evident to his close friends than to himself that the insidious disease which finally prostrated him had already made such inroads upon his sturdy constitution that his strength must prove unequal to the arduous and nerve-racking trial work which he so dearly loved and in which he had formerly been so tireless.

Having entered upon judicial work, he adorned it with grace, dignity, fidelity, and ability, as he had theretofore every activity in which he had been engaged, and added to the large circle of his friends and admirers every member of the bar that had occasion to appear before him.

May the affectionate though inadequate tributes to his life and character, which we now ask this court to place upon its records, if perchance they fall under the eye of ambitious young men of our profession who are to follow us, furnish an added impulse towards a pure, noble, useful, and illustrious career.

Mr. Gerry W. Hazelton of Milwaukee then addressed the court:

May it please the Court:—It seldom happens that the death of a member of our profession occasions such sincere and general sorrow as attended the departure of Judge QUARLES in the city where he had so long resided. Although it was known that the end could not be far away, the report of his demise when it came touched the hearts of the entire community. One of our most distinguished lawyers, one of our most prominent and estimable citizens had passed away,

and the people mourned his loss. This was the public estimate of the man. It was indicative of the eminent place accorded him as a jurist and citizen by the public—a place he had justly won by high character and honorable achievement.

But there was another realm in which his passing awakened sentiments the general public could not be expected to share. It was the circle where the intimacy of social and personal relations is emphasized and sentiments of esteem ripen into sentiments of affection. Within the limits of this circle where heart-qualities play so large a part, the sense of loss touched a deeper chord. The Judge was an agreeable companion. He loved his friends and they loved him. It cost him nothing to be kind and genial because it was his nature. He harbored no enmities and exacted no allegiance he was not ready to return. In his social moods, in the company of his friends, he was notably genial and entertaining.

Nor was he commonplace. Richly endowed by nature, his intellectual gifts ensured him distinction and his ambitions were elevated and honorable. He did not seek to rise at the expense of others. He preferred to win on his own merits, and realized that hard work and good habits supply the real and only basis of professional success. He gained prominence at the bar early in his career and moved steadily forward to a place in the front rank of his profession. At his prime he was recognized as among the foremost trial lawyers in the state and participated in many important trials within and outside of his own locality.

But it must not be inferred that his professional achievements were limited to any specialty. His practice was general. He was a diligent student and thoroughly grounded in the elementary principles of jurisprudence, and his service on the bench, all too brief, attested his ample ability to meet all the requirements of an exacting judicial trust. While he appreciated the dignity of his office, his natural urbanity and kindness of heart were so manifest as to win the respect and good wishes of the bar.

Pre-eminently fair-minded, his chief aim and desire on the bench was to be just and impartial and to be guided by the best lights at his command, and it is not too high praise to say of him that he was incapable of conscious wrong either on or off the bench.

He possessed marked literary tastes and devoted much of his professional gains to the purchase of books. His private library was among the largest and choicest in the state. It was a feature of his home in which he took just pride, and it was a pleasure to note the satisfaction with which he called the attention of his friends to the rare volumes which graced his shelves. Nor were his books gathered for show. Many leisure hours were spent in their enjoyment.

Some one has said that a person cannot live amidst books without absorbing something of their contents. There may be a grain of truth in this; but it is better to say that the person who inclines to surround himself with books is likely to acquire some knowledge of their contents, and such knowledge is sure to expand and enrich his mind. "The place that doth contain my books, my best companions," said Fletcher, "is to me a glorious court where hourly I converse with the old sages and philosophers."

The Judge's familiarity with books, though never paraded, doubtless added grace and charm to his speech and contributed to the happy manner in which he acquitted himself on all occasions. His impromptu speeches at the gatherings of his friends and companions were always happy and felicitous, while his more elaborate addresses and orations afforded unmistakable evidence of a brilliant and cultured mind.

After his return from a soldier's experience in the Civil War he prepared himself for admission to the bar, and while yet a young man was thrice elected to the office of district attorney of Kenosha county. Later he was nominated and elected to the Assembly. This was in 1879. In 1880 he was elected to the State Senate. In both bodies he was a recognized leader. On the 4th of March, 1899, he took his seat in the Senate of the United States as the colleague of Senator Spooner. It was well known among his friends that in entering upon the duties of this high office he did not seek mere notoriety. His ambitions were higher. His primary aim was to acquaint himself with the duties and requirements of the position, and he devoted himself eagerly and earnestly to this task. No one knew better than he that whatever may be one's aptitude for useful service in Congress, he has much to learn before he can assume a leading part in national legislation. The men who have won enduring fame as constructive statesmen are the men who have remained in the public service long enough to study and comprehend the needs of the national government. The late President Harrison, although a man of superb intellectual endowments, whose administration was distinguished as eminently efficient and capable, added nothing to his reputation by his service of six years in the Senate. Such is the law of the situation. Suffice it to say that our lamented friend accomplished all that could be expected of any Senator whose service was limited to a single term. He participated in the discussion of questions pertaining to the work assigned to his committees sufficiently to demonstrate his ample capabilities in debate and his power to command the attention of the Senate. It is vain to regret that a career of so much promise was limited to a single term.

It does not require an extended survey of the political field to

demonstrate that the unexpected is constantly happening, and one who suffers his ambitions to lead him into that field must be willing to take the world as it comes. But in his case it was unquestionably a blessing in disguise.

I speak with assurance when I say he was content to accept a position in line with his professional ambitions and studies, which at the same time afforded him the opportunity he coveted of maintaining a home in the city he loved, with his family, his friends, and his books. It was his ideal life.

He had little relish for the rivalries, the jealousies, the antagonisms, the muckraking which attend a political career, and was more than willing to take up the duties and responsibilities of a different department of the public service. The serener atmosphere of judicial inquiry and investigation appealed to him, and in that atmosphere he was privileged to spend the closing years of an eventful and useful life.

Enough has been said to indicate that our friend was a child of sentiment. His heart was full of it. He loved nature. He loved art. A fine picture, a beautifully bound volume, excited his admiration. The felicitous expression of a thought, a fine passage in literature, an eloquent peroration, arrested his attention. Indeed, everything which embodied supreme excellence touched a responsive chord in his nature.

It has been said that a man is known by the company he keeps. This may be true, but it may be affirmed with equal confidence that a man is known by the sentiments he cherishes. These are the real test of character and quality. Sentiment is the bond of society and the basis of fellowship. No one can measure up to the complete requirements of good citizenship without it. Home is the primal theater of its triumphs, and its rewards are scattered like fragrant flowers all along the pathway of life.

Our lamented friend illustrated and emphasized that high type of manhood in which ample intellectual endowments were happily blended and tempered with the refining influence of sentiment and affection; and he will be remembered not only for his professional standing and achievements, but for those qualities which adorned his domestic life and surrounded him with, and endeared him to, a large circle of loyal and devoted friends.

On behalf of the court Mr. Chief Justice WINSLOW responded as follows:

Gentlemen of the Bar: I knew Judge QUARLES intimately for many years, and I loved him well. I first met him when, as a young lawyer, I was just entering upon the practice at Racine. He had

then been at the bar for several years, and was already in the full tide of successful practice at Kenosha. He had thus early established his reputation not only as an able lawyer and a wise counselor, but as a brilliant orator as well. In fact, it is not too much to say that he was even then recognized as the leading citizen of his native city.

From that time, now so long ago, we met frequently, and our friendship grew apace. In that friendship, I can truthfully say, there was never either rift or break, but, on the contrary, the ties between us grew closer and stronger as year succeeded year.

Not many years after that first meeting we formed a law partnership at Racine, thinking to make it an association for life; but Fate soon willed otherwise. After two short years our paths separated, but not our hearts. Neither time nor distance could affect for a moment the mutual trust and confidence between us.

It is hard to speak of the qualities of a near friend with absolute fairness, and yet that is what I know he who is gone would desire, and that is what I shall try to do.

We may not say, I think, that he possessed so profound and accurate a legal mind as some of the great men who have adorned the Wisconsin bar, but I think it may be truly said that among the lawyers of the state during the time of his active practice he was one of the very foremost among a band of strong men.

He was endowed by nature with physical strength, with an engaging and manly presence, with a strong and active intellect, and an unusual talent for public speaking. To these natural gifts was added a liberal education, both general and legal, and that indispensable quality which is better than genius and more useful than brilliancy, namely, unremitting industry. He knew the value and the necessity of the preliminary drudgery of the office, the careful study of the law applicable to the case, the marshaling of the facts, the making of the trial brief, and the order of proof, and all the work of preparation which goes to professional strength "as the sharpening of the sword goes to battle," and he neglected none of them. Thus he came to the trial of every case fully armed and equipped with a plan of campaign carefully prepared, knowing every move which he expected to make, and ready to meet every move on the part of his adversary which human foresight could anticipate.

He loved the trial of important jury cases. His was truly the "joy of battle." From the moment the first juryman was called into the box until the verdict came in, his every move was carefully studied and intended to accomplish a definite result. He left no stone unturned, no honorable and lawyerlike effort untried, to win his cause. He struck heavy blows, but he struck in the open, not in the dark. He fought constantly and hard from beginning to end, but he fought

fair. In the court room he was a foeman as chivalrous as ever laid lance in rest upon the field of honor.

Courteous alike to court, to opposing counsel, and to the honest witness, he was a terror to the witness who was seeking to conceal or color the facts. In very many respects he was the ablest and most successful trial lawyer that I ever knew, and I have known many. But while the trial of issues of fact, the examination of witnesses, and the marshaling of the facts in a jury argument were his strongest points, his briefs on difficult legal questions were always strong, and his oral arguments upon such questions effective and convincing.

I can well imagine that he must have made well nigh an ideal trial judge, for he was admirably fitted for the work by nature, by education, and by experience.

As I now look back to that short period of close association with the man as a partner, I do so with the greatest satisfaction. Brief as that association was, I then came to know the admirable qualities of his head and heart as few could know them.

The word "gentleman" is much used and much abused; it is applied indiscriminately to many who do not deserve it, but one makes no mistake in applying it to Judge QUARLES.

His somewhat ceremonious courtesy, which was often misjudged and thought to be affectation by those who did not know him well, was simply the natural expression of the feelings of a heart innately kind.

Rarely indeed has a truer heart beat in human breast than that of the man whom we recall today. Friendship was no passing fancy with him, courtesy no garment to be put on as occasion demanded. His friendships were not swiftly made indeed, but when made they were no fair-weather friendships. If they called for labor or self-sacrifice, he was ever ready to give it, nor did he count or spare the cost to himself. I who speak have good occasion to know this, and I gladly bear witness to it now. The world can never again be quite so bright to me now that he is gone; the circle of the friends of my youth is smaller; there is one less staunch and loyal comrade on life's journey upon whom I may rely in the time of trial when my heart craves sympathy.

For months which grew into years our friend knew that he was walking day by day in the valley of the shadow; his frame bent and his step faltered, but never his indomitable will; the active brain still performed its appointed tasks, the brave heart gave no sign, until one day when summer waned,

And ripening leaves fell one by one before the Autumn's breath,
A grave, sweet Angel stood by his side and whispered,
"Come thou with me, I am thy good friend, Death!"

CASES DETERMINED

AT THE

January Term, 1912.

SURE, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

December 6, 1911—January 9, 1912.

Street railways: Negligence: Acts of passengers: Meddling with machinery: Injury to another passenger.

1. **Common carriers are not responsible for the lawless acts of persons not under their control, which they could not reasonably anticipate.**
2. **A carrier is not bound to anticipate that a passenger will intentionally meddle or interfere with the machinery of the car or train, and is not liable for injury to another passenger from such act, in the absence of any other ground of negligence. So *held*, where a boy, who was a passenger on a street car, deliberately and without authority released a brake, which was properly set, causing the handle thereof to swing rapidly around and to strike and injure another passenger.**

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action for personal injuries. On the 27th day of February, 1908, plaintiff boarded one of defendant's cars standing at the east end of the North Avenue line and became a passenger thereon. The car was soon to start upon its return trip. The plaintiff was smoking and stood in the rear vestibule, as required by the rules of the company. The rear brake was set in order to hold the car in its position until it was ready to start, and the plaintiff stood very close to the handle

thereof, which is a heavy brass handle such as is usual in city street cars. Just as the motorman started the car, or just after he had started it, a boy standing on the rear platform intentionally and without authority from the conductor, but with the idea of assisting in the operation of the car, released the brake, and either accidentally or otherwise let go of the handle, and it swung around with considerable rapidity and force, striking the plaintiff a blow in the stomach of some severity, and for which this action is brought.

The brake and its mechanism are thus correctly described in respondent's brief:

"The brake handle swings freely towards the left or anti-clockwise, but, when moved clockwise, the ratchet in the handle at the point where the handle is attached to the brake staff engages the brake staff and turns the entire staff so as to wind up a chain fastened at the lower end of the staff and under the platform of the car. When the chain is wound up to the desired point a ratchet wheel, through which the brake staff passes, and which is keyed firmly to the staff, is engaged by a dog being pressed against the ratchet by the foot of the operator, and the staff is thus held until the brake handle is forcibly moved clockwise far enough to disengage the dog from the ratchet or until the dog is by some other method forcibly removed from the ratchet. At all times, except when the dog is engaged, the brake handle moves freely anti-clockwise."

It was the conductor's duty to loosen this brake at about the time the car started, and the conductor testified that just as or just after he gave the motorman the signal to start he was coming out of the back door of the car to release the brake, and it was released by the boy.

The jury returned the following verdict:

"(1) Did the witness, Harold Krebs, release the brake at the time of the accident? *A.* Yes.

"(2) If you answer question number 1 'Yes,' then answer: Was such release of the brake by Harold Krebs the proximate cause of the injury to the plaintiff? *A.* Yes.

"(3) Ought the defendant, in the exercise of ordinary care, to have anticipated that the brake, if left in a set position, might be released by a jar or jolt caused by the operation of the car? *A.* No.

"(4) Ought the defendant, in the exercise of ordinary care, to have anticipated that the brake, if left in a set position, might be released by a person upon the car not an employee? *A.* Yes.

"(5) Was the failure of the defendant to exercise the care described in the third and fourth questions, or either of them, the proximate cause of the injury to the plaintiff? *A.* Yes.

"(6) Was the plaintiff guilty of any want of ordinary care which proximately contributed to his injury? *A.* No.

"(7) What sum will reasonably compensate the plaintiff for the injury which he sustained? *A.* $1,000."

On motion the court changed the answers to the fourth and fifth questions from "Yes" to "No," and rendered judgment for the defendant on the verdict, from which the plaintiff appeals.

For the appellant there was a brief signed by *Rubin & Lehr,* attorneys, and *W. B. Rubin* and *H. B. Walmsley,* of counsel, and oral argument by *Mr. W. B. Rubin* and *Mr. Walmsley.*

For the respondent there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *James D. Shaw.*

WINSLOW, C. J. The brake in question and all the machinery connected with it seem to have been of approved pattern, in excellent condition, and were absolutely essential machinery for the proper operation of the car. So far as appears in the case, it would not be possible to have a brake covered or so firmly fastened in position that a passenger could not release it if he deliberately endeavored to do so, and yet have it capable of instant release by an employee when the necessities of the service required. There are nu-

merous appliances of this nature connected with the transportation of passengers by steam and by electricity as well.

The general principle often decided is that a carrier is not bound to anticipate that a passenger will intentionally meddle or interfere with the machinery of the car or train; that the meddler becomes thereby a trespasser; and if injury results to another passenger by his act the carrier will not be liable in the absence of any other ground of negligence. Carriers are rightly held to a high degree of diligence, but they are not held responsible for the lawless acts of third persons not under their control, which they could not reasonably anticipate. *McDonnell v. N. Y. Cent. R. Co.* 35 App. Div. 147, 54 N. Y. Supp. 747; *McDonough v. Third Ave. R. Co.* 95 App. Div. 311, 88 N. Y. Supp. 609; *Moore v. Woonsocket St. R. Co.* 27 R. I. 450, 63 Atl. 313; *Krone v. Southwest Mo. E. R. Co.* 97 Mo. App. 609, 71 S. W. 712. While there is some evidence in the case to the effect that passengers sometimes played with the brake, or leaned against it, or touched the dog with their feet, there is absolutely nothing in the evidence to show that a passenger was ever known to deliberately loosen it when properly set, as in this case. Had the brake here been released by accident, by reason of a passenger's striking the dog with the foot, and releasing it, or in some other purely accidental way, the question presented would be of a different character.

On the undisputed facts presented, a verdict for the defendant should have been directed, on the ground that no negligence was shown.

By the Court.—Judgment affirmed.

CHANDLER and others, Appellants, vs. MUNKWITZ REALTY & INVESTMENT COMPANY and others, Respondents.

December 6, 1911—January 9, 1912.

Wills: Probate: Sale of land by executor: County courts: Imperfect ancient records: Presumption of regularity: Notice of hearing: Proof.

1. After the lapse of sixty years, and upon proof that the records of the probate court were carelessly and imperfectly kept at the time of the transactions in question, and upon evidence showing other proceedings in the same matter, it is presumed, in support of a title founded on an executor's deed, that the probate judge knew the law and did in fact appoint a guardian *ad litem* for minor heirs before admitting the will to probate, and did enter an order requiring the executor to file a bond before entering upon the duties of his trust, and duly issued letters testamentary to him after he had qualified, and that the proceedings in the probate court were regular, although these facts did not appear from the records or files of that court produced at the trial.
2. Sec. 18, ch. 66, R. S. 1849, did not require personal service of notice on the parties in interest of the hearing upon an application to admit a will to probate, but service by publication was sufficient; and under sec. 19 the will might be proved, in the absence of a contest, by the testimony of one of the subscribing witnesses.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

William Goulding died testate in the month of June, 1850, and at the time of his death was the owner of certain real estate and personal property situated in Milwaukee county, Wisconsin. Decedent left surviving him his widow and three infant children. Two of the children died while still minors and left no issue. The widow died November 27, 1879. William Malcolm Goulding, one of the children of the decedent, was born some time between the years 1845 and 1849, and died insane September 13, 1906, unmarried and intestate.

The will referred to contained the following provisions:

"I give and devise all of my real estate wherever and however situate and all my personal estate of what nature or kind soever unto my beloved brother George Goulding in trust for the payment of my just debts and of the residue after the payment thereof and the necessary expenses in the execution of the trusts herein created to hold unto him the said George in trust to and for the use of my wife and children, with full ample and perfect power unto the said George to sell and dispose of all and singular my real and personal estate and proper deeds of conveyance therefor to execute and deliver and upon such terms and in such manner as unto him shall seem meet, and I do appoint the said George executor of this my last will and testament with the authority and power aforesaid together with such authority and power as he would have as executor aforesaid. It is my will that the estate aforesaid devised and the property aforesaid in trust given unto the said George in trust aforesaid shall be by him applied after the payment of my just debts to the suitable maintenance and support of my wife and children and in the tuition of my children during their minority and so soon as they may arrive at full legal age the equal share of my estate after application thereof to the uses aforesaid be distributed to the child becoming of age from time to time as my said children shall so arrive at maturity, reserving nevertheless in such division and distribution an equal share unto my wife with said children, that is to say a share equal to one child's share. I do commit the tuition and custody of my children unto my beloved wife and do direct my executor to pay over to her from time to time such sums of money and to allow unto her such of my personal property as she shall deem necessary for the support of herself and my said children and for the tuition of said children."

This will was admitted to probate and George Goulding assumed to act as executor and trustee under the will. Among other things the court found that the probate court of Milwaukee county on July 15, 1850, made an order reciting that the last will and testament of William Goulding had been delivered into the office of the probate court, and fixed Au-

gust 9th following as the time appointed for the proof of the will, and further provided for publication of such order in a newspaper in said county; that on August 9, 1850, pursuant to said order, proceedings were had in the county court by which the testimony of one of the witnesses to the will was taken, from which proof it appeared that said will was executed about two weeks before the death of said William Goulding, who was then twenty-five years of age; that on said 9th day of August an order was made by the said court admitting said will to probate and adjudging that it was duly proven and should stand as the last will and testament of said William Goulding; that the executor named in said will filed his written consent to act and made the necessary oath, which consent and oath were filed August 15, 1850; that said executor gave a bond, which was approved by the court on August 15, 1850, but that there appeared to be no entry as to the giving of such bond or the approval thereof in any book of record in said court; that there was no record in the probate court of the issuing of letters testamentary; that the parcel of land involved in this suit was appraised at $556.25; that at various times from June 28, 1853, the widow, Sarah M. Goulding, filed certain petitions in said probate court reciting among other things that she had by said will been appointed guardian of the minor heirs of said deceased, and praying for an accounting from the executor and for an allowance, and that certain orders were made pursuant to such petitions; that on the trial no evidence was produced of the appointment of any guardian *ad litem* for the minor heirs of the deceased in said probate court; that the records and proceedings of said court for some time subsequent to 1850 were not fully or accurately kept, and that certain of the proceedings were filed in the estate of said deceased, but no entry appears to have been made in any record book appearing now to be in existence in said court; that no fraud was committed by any one interested in said probate proceedings by in any

manner concealing from said probate court the existence of the minor children of the deceased, but on the contrary said fact was before the court at all of the proceedings therein taken; that in the bonds given by the executor, which were approved by the court, there were recitals of the issuing of letters testamentary to George Goulding, although there is no record evidence other than that of the issuing of the same; that on February 9, 1856, George Goulding as executor conveyed by warranty deed to John Plankinton the land involved in this action, which deed was thereafter duly recorded; that there is no evidence of any fraud on the part of the grantor or of the grantee in such conveyance; that immediately after the execution of said deed the facts in connection with such conveyance and the terms thereof were all presented to the county court upon a petition by the widow, and that said executor appeared at the hearing before said court and was examined in relation to the same and that the widow appeared in person and by counsel; that after said hearing the county court required said executor to file an additional bond; that from time to time subsequently thereto some payments were made by said John Plankinton on account of the purchase of said property; that at the time of the commencement of this action the title to the lands in controversy was in the defendants and that such premises were occupied by the defendants and their grantors continuously since the year 1856; that the evidence in this case is not sufficient to establish the fact that on the 9th day of August, 1850, or on the 19th day of February, 1856, William Malcolm Goulding was feeble-minded or mentally incompetent; that this action was not brought until the 3d day of December, 1909, and after the period limited and prescribed by the statutes of the state of Wisconsin within which any action might be brought to enforce any rights of the plaintiffs in the premises.

As conclusions of law the court found that the proceedings of the probate court of Milwaukee county in the matter of

the estate of William Goulding admitting said will to probate were regular and proper; that the deed from George Goulding as executor to John Plankinton, made in 1856, was duly and regularly made and executed and the proceedings had antecedent to the making of the same were regular, and that the deed was valid and binding on all persons having any interest in said estate, and that the defendants were the owners of the lands described in the complaint and were entitled to judgment dismissing the complaint.

The action was brought by the plaintiffs as heirs at law of William Malcolm Goulding to recover the property conveyed to Plankinton in 1856 by the executor of his father's estate, and plaintiffs appeal from the judgment of the court dismissing their complaint.

The cause was submitted for the appellants on the brief of *E. Blewett,* attorney, and *Maurice McKenna,* of counsel, and for the respondents on that of *Flanders, Bottum, Fawsett & Bottum,* attorneys for *Munkwitz Realty & Investment Company, Miller, Mack & Fairchild,* attorneys for *Jos. Schlitz Brewing Company* and others, and *W. E. Black,* of counsel.

Barnes, J. The main contentions of the appellants may be summarized as follows:

(1) The deed from George Goulding, executor, to John Plankinton was void because no petition was presented to the probate court praying for the probate of the will; because the proof of the will which was offered was insufficient to establish it; because no guardian *ad litem* was appointed for the minor heirs of the decedent before the will was admitted to probate nor thereafter; because no letters testamentary were ever issued to George Goulding as executor; and because the probate court did not fix the amount of the bond which the executor should give, or in fact order him to give any bond.

(2) The invalidity of this deed being established, it is contended that no statute of limitations and no claim of adverse

possession operated to deprive William Malcolm Goulding of his title to the property during his lifetime, for the reason that he was under the disability of minority until at least the year 1866, and that from and after that time he was insane until the time of his death in 1906.

(3) That the action falls within the provisions of sec. 4218, Stats. (1898), and that the plaintiffs herein, who are the heirs at law of William Malcolm Goulding, might bring their action at any time within five years after his death.

The defendants claim (1) that the proceedings in the probate court were regular, and that in any event, after a lapse of nearly sixty years, they should be presumed to have been regular; (2) that the evidence does not show that William Malcolm Goulding was insane at the time he reached his majority or for a long time thereafter, and the court does not so find, and that he lost any rights he might have had, by failure to bring his action within the time limited by law, after he became of age; (3) that the present action is barred because it was not brought within one year after the death of William Malcolm Goulding. Some other defenses are also urged.

If any one of the above contentions of the defendants is well taken the judgment must be affirmed. The circuit court found:

"I further find that records and proceedings of said probate court for some time subsequent to 1850 were not fully or accurately kept, and that certain of the proceedings were filed in the estate of said deceased William Goulding, but no entry thereof appears to have been made in any record book appearing now to be in existence in said probate court."

There is ample evidence to sustain this finding. As a conclusion of law the court found:

"The proceedings of the probate court of Milwaukee county in the matter of the estate of the said William Goulding in admitting the said will to probate were regular and proper."

If the established facts warranted the court in arriving at this conclusion the plaintiffs have no case. To warrant such

a conclusion this court must be satisfied that the proceedings in the probate court were regular and that either a guardian *ad litem* was appointed for the minors or such appointment was unnecessary; and also that letters testamentary were issued or that the issuance of such letters was unnecessary. The absence of records showing that letters testamentary were issued or that a guardian *ad litem* was appointed constitutes the substantial objections that are urged against the regularity of the proceedings in the probate court. The statute did not require personal service of notice on the parties in interest of the hearing to determine whether the will should be admitted to probate. Sec. 18, ch. 66, R. S. 1849. Such notice might be served and was served by publication. In the absence of a contest the will might be proved under the statute by the testimony of one of the subscribing witnesses. Sec. 19, ch. 66, R. S. 1849.

The court did in fact approve of the bond which the executor gave, both as to form and amount, and the objection that no order was found fixing the amount thereof in advance of the bond being given, is, to say the least, somewhat technical.

Should the court indulge in the presumption that letters testamentary were issued, though no record thereof was found, and that a guardian *ad litem* was appointed, although no evidence of that fact was found either in the records or the files produced in court? This question must be answered in the light of the established fact that the records in the office of the probate judge of Milwaukee county were loosely kept at the time the guardian *ad litem* should have been appointed and also at the time letters testamentary should have been issued. The additional bond given by the executor in 1856 recited as a fact that letters testamentary had been issued.

In *Gentile v. Foley,* 3 La. Ann. 146, a judicial sale of property was made, and after the lapse of nearly thirty years it was sought to set the sale aside because there was no proof that process had been served on one of the parties in interest.

The court held that, in consequence of the notorious want of care in the preservation of public records in the country parishes, the absence of such record evidence when applied to ancient proceedings raises but a remote presumption and one which must be held subordinate to the legal presumption that the judge before whom the proceedings were had did his duty. Citing 1 Greenl. Evidence, p. 19.

In *Gray v. Gardner,* 3 Mass. 399, the court held that after twenty years' acquiescence by the heirs of the intestate in the possession of the real estate of their ancestors, held under a sale by the administrator of the estate, the court will presume that the administrator took the oath and posted the notifications according to law previous to the sale, evidence being given of the license to sell and of the actual sale at auction.

In *Brown v. Wood,* 17 Mass. 68, it was held that where a will had been proved twenty years by the oath of only two of the three subscribing witnesses, without accounting for the absence of the third and without any record of previous notice to the heirs, it would be presumed that a sufficient reason existed for the absence of the third witness, and that the notice required by statute was duly given to the heirs.

In *Giddings v. Smith,* 15 Vt. 344, it was held that as to a will probated in 1781, where no proof was preserved that the statutory notice of the application to admit the will to probate was given to the heirs, the court would presume, after the lapse of a long period of time, that the requisite notice was given. The case was decided in 1843.

In *Brockenborough v. Melton,* 55 Tex. 493, the validity of a sale depended upon whether the party appointed administratrix in the first instance had resigned before another person was appointed administrator in another county. There was no proof of such resignation found in the records or files of the court. It was held that after the lapse of thirty-four years the court would presume that the resignation was regularly made and placed on file, although it could not be found.

In *Hazard v. Martin,* 2 Vt. 77, the court held that where an administrator conveyed a farm subject to the widow's dower, and possession of the two thirds under a deed is held for over thirty years, a presumption of the regularity of the administrator's proceedings prior to his deed arises in favor of the reversion of the dower.

In *Battles v. Holley,* 6 Me. 145, it was held that after the lapse of more than thirty years the authority and qualification of an administrator were presumed from the existence of an inventory and a schedule of claims in the probate office, attested by his oath, and a petition preferred by him to the court of common pleas for license to sell the real estate of his intestate, with the original certificate of the judge of probate thereon, recognizing him as an administrator; the probate records and files of that period appearing to have been loosely kept, and no other vestige of his appointment being discoverable.

In *Lay's Ex'r v. Lawson's Adm'r,* 23 Ala. 377, it was held that where an order of sale made by the orphans' court does not on its face appear to have been granted on the application of the administrator, that fact will be presumed after the lapse of twenty years.

Turning to our own decisions, it is said in *Blodgett v. Hitt,* 29 Wis. 169, that this court would presume that, where the probate court had made an order directing an administrator's sale of land, due notice of the petition therefor was given to the parties interested and that other jurisdictional facts existed, in case the record is merely silent in respect thereto. This language is approved in *Portz v. Schantz,* 70 Wis. 497, 36 N. W. 249. There an affidavit of publication did not affirmatively show that a certain notice was published during the statutory period. It simply might or might not have been so published. The court said that after the lapse of many years it would presume that the publication was regularly made.

In *Randall v. Rovelstad,* 105 Wis. 410, 81 N. W. 819, there was found formal entry of a survey of a highway in a recognized record book of the county, made by an official person, and it was held that, inasmuch as such record should only have been made after certain preliminary steps had been taken, the court after the lapse of many years would presume that such preliminary steps were in fact taken.

Dickinson v. Smith, 134 Wis. 6, 114 N. W. 133, presented a situation where the common council of the city of Appleton was authorized by sec. 15, ch. 387, P. & L. Laws of 1870, to have a certain survey made. The statute authorized the city surveyor, under the direction of the common council, to make a new plat of the city, which plat, with the approval of the common council indorsed thereon by the city clerk, was required to be filed in the office of the city clerk, and it was further provided that an attested copy be recorded in the office of the register of deeds. While the act was in force a survey was in fact made. There was no record, however, of any direction of the common council to have such survey made or of any resolution to that effect. It was held that after a lapse of a long period of years the court would presume that the requisite authority was given by the council and that the survey was made under its direction.

In *Strange v. Oconto L. Co.* 136 Wis. 516, 117 N. W. 1023, the record was silent as to whether or not the chairman of a county board voted on a certain resolution which came before the board and which he declared carried, but upon which he was not recorded as having voted when the ayes and noes were called. It was held that after the lapse of about thirty years the court would presume that he voted for the resolution, having declared that it was carried. Unless he did so vote there was not a majority in favor of the passage of the resolution.

In *Olwell v. Travis,* 140 Wis. 547, 123 N. W. 111, the only records found in reference to the laying out of a highway were a petition signed by certain persons and the record of a survey.

This record was supplemented by proof that a highway had been opened substantially along the line of the survey and had been used for about sixty years. It was held that after the lapse of that period of time the court would presume that the persons who signed the petition for a highway were freeholders, and that the town board made the necessary order laying out the same in accordance with the survey, and that all the steps necessary to the laying out of a legal highway were taken.

It would appear that these authorities would amply justify the court in drawing the conclusion of law which it did draw in the instant case.

The search testified to was not of a very thorough character. The evidence showed that there was an accumulation of 27,000 or 28,000 files in the probate office; that sometimes the files in as many as fifteen or twenty different estates were kept in one holder or box; that it had been a common occurrence for different attorneys to be engaged in looking over different files in different estates at the same table, and that it sometimes happened that the files got mixed and the papers from one estate were inadvertently put into the file with papers in some other estate. The custodian testified that in making the search which he did he merely looked into the place where the papers would ordinarily be found. There were two record books produced. In reference to these the custodian said that he had no personal knowledge as to whether they covered all the matters to which they purported to relate, and there is at least some evidence tending to show that another record book was kept at this time which could not be found. The evidence further tended to show that there were a number of orders and original papers in the proceedings in relation to the estate that were found in the office, but of which no record or minute had been made in any of the books produced in court. Among those papers was the consent of the executor to act, the executor's oath, petition for the

appointment of commissioners, the warrant of the commissioners, the inventory and appraisal, the report of the commissioners, the petition of Sarah Goulding filed August 2, 1853, for an allowance for support and maintenance, the order made on this petition, and the petition of Sarah Goulding to require the executor to give an additional bond, and the citation to the executor by virtue of such petition. The absence of any record of these proceedings would indicate that either the records were kept in a very slovenly manner or that there was some record book kept which was not produced. Furthermore, it appeared that the widow was dissatisfied with the conduct of the executor. In 1853 she petitioned the court that he be required to pay her a suitable allowance for maintenance and that he be required to file an account of his doings as executor. In 1856 she again petitioned the court that the executor be removed for maladministration. In these proceedings she was represented by an attorney, and there is no suggestion in the motion papers that there was any irregularity whatever about the appointment of the executor or about admitting the will to probate.

Without attempting to lay down any hard-and-fast rule which might prove troublesome in the future, we think the law is and should be, under the facts disclosed by the evidence in this case, that the court after the lapse of sixty years must presume that the probate judge knew the law and in fact did appoint a guardian *ad litem* for the minor heirs before admitting the will to probate, and required the person named as executor in the will to file a bond before entering upon the duties of his trust, and duly issued letters testamentary to him after he became entitled to receive the same, and that the proceedings in the probate court were regular. It therefore follows that the deed to John Plankinton conveyed good title to the lands therein described.

By the Court.—Judgment affirmed.

McBRIDE, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

December 6, 1911—January 9, 1912.

Street railways: Injury to passenger: Evidence: New trial: Error in charge: Excessive damages: Costs.

1. **In an action against a street railway company for personal injuries, plaintiff having testified to facts showing that she was a passenger, the negative testimony of several conductors to the effect that they did not see or remember anything of such an accident, did not raise any issue for the jury as to whether or not she was a passenger; and the fact that in his charge the trial judge spoke of her as a passenger was not such an error as warranted the granting of a new trial.**
2. **Defendant should be required to pay the costs of the trial as a condition of the granting of a new trial upon the ground that the damages awarded by the jury to plaintiff are excessive.**

APPEAL from an order of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Modified.*

The appeal is from an order granting a new trial.

For the appellant there was a brief signed by *Rubin & Lehr,* attorneys, and *Horace B. Walmsley,* of counsel, and oral argument by *Mr. W. B. Rubin* and *Mr. Walmsley.*

For the respondent there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *James D. Shaw.*

TIMLIN, J. After a special verdict in favor of the plaintiff, on motion for a new trial the court set aside this verdict on the ground that in his instructions to the jury he told them the plaintiff was a passenger. He had submitted no question in the special verdict covering that point. Plaintiff testified to facts which, if true, showed her to be a passenger. The conductor on one street car testified he did not see anything of any accident at the place in question and did not stop his

car and go back and pick up an unconscious or an injured woman. The conductor of another street car did not remember anything of such an accident. The conductor of a third street car saw nothing of such an accident. The conductor of a fourth street car did not remember of seeing anything of such an accident. The conductor of a fifth street car did not see anything of such an accident. The conductor of a sixth street car did not see any such thing.

The first car left Grand avenue about 10:55 p. m. on May 25, 1908, the night of the accident, the second at 11 p. m. the same evening, the third at 11:05 p. m., the fourth at 11:10 p. m., the fifth at 11:15 p. m., and the sixth at 11:20 p. m. The plaintiff's testimony was that she left a theater on Milwaukee street south of Wisconsin street, to the best of her recollection, at about 10:45 p. m., and took a National avenue car at the corner of West Water street and Grand avenue. This testimony raised no issue for the jury on the question of whether or not the plaintiff was a passenger, although it had some probative force on the question of whether or not she was injured. The court was in error in granting a new trial on this ground. But the court before signing the formal order evidently gave the matter further consideration and added that he, "being further of the opinion that the verdict is excessive, and would even in the absence of error in the charge warrant the setting aside of the verdict, in the discretion of the court," granted a new trial. This ruling we could by no means interfere with as an abuse of discretion, but the court failed to award costs against the defendant as a condition of granting a new trial on this latter ground. The order appealed from, therefore, is modified, and the cause remanded with directions to the circuit court to require the defendant to pay the costs of the trial.

By the Court.—Order modified, and the cause remanded for further proceedings. Costs awarded to appellant.

HAZELTON and another, Appellants, vs. NEW YORK LIFE INSURANCE COMPANY, Respondent.

December 6, 1911—January 9, 1912.

Trusts and trustees: Accounting: Fund for accumulation: Gains: Compound interest.

Where a trustee, or a person charged with the duty of investing a fund for the purpose of accumulations, fails to show, when properly called upon to account, what the actual gains have been, the usual gains with annual rests will be charged him.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Modified and affirmed.*

The action was before this court on former appeals and is reported in 141 Wis. 639, 124 N. W. 1014, where a statement of the facts will be found. Upon the second trial the circuit court found, among other things, that plaintiff had failed to offer any evidence tending to show that when the certificate in question was issued there was any money in the treasury of the defendant company belonging to *Gerry W. Hazelton* or Martha L. Hazelton, or that any money belonging to either of them was ever invested by said company, or earned any interest or accumulations on account of such investment; also that the evidence fails to sustain the claim of the plaintiffs that a trust relation was created by the execution and delivery of said certificate which placed the company under any legal obligation to account for interest on said amount of $12 mentioned in said certificate; but that plaintiffs are entitled to judgment for $12, with interest from the commencement of the action. From the judgment entered accordingly the plaintiffs appeal.

G. W. Hazelton, for the appellants.

For the respondent there was a brief by *O'Connor, Schmitz & Wild,* and oral argument by *J. L. O'Connor.*

VINJE, J. Upon the first trial of this case a judgment for $12 in favor of plaintiffs was entered. Both parties appealed. This court held (141 Wis. 639, 124 N. W. 1014) that the defendant take nothing by its appeal, and that upon the plaintiffs' appeal the judgment should be reversed and the cause remanded for a new trial. The opinion and judgment of the court established (1) that the defendant owed plaintiffs the sum of $12 since 1867; (2) that such sum of $12 was entitled to share in the accumulations, if any, of the defendant company; and (3) that upon the evidence then before it the court could not determine the amount of such accumulations, if any, and hence sent the case back for a new trial to determine this amount. The court said:

"The principal difficulty with the case lies in the uncertainty of the character of the plaintiffs' interest in the certificate and whether the money or interest of the plaintiffs was so used as to charge the defendant with interest or profits, and the amount thereof. Evidence upon another trial should be directed to these points."

It is apparent that the court, by holding that the defendant take nothing by its appeal, had no doubt as to plaintiffs' interest in the certificate to the extent of $12 at least, and that the only doubt it had was as to the amount of accumulations, if any, to which the plaintiffs were entitled in addition to the $12.

Unfortunately the evidence does not now disclose what the $12 have actually earned in the hands of the defendant since 1867. The plaintiffs failed to secure such evidence and the defendant did not see fit to disclose the fact. But there is fairly satisfactory evidence as to what the $12 should have earned in the hands of the defendant, and the rule is well settled that where a trustee, or a person charged with the duty of investing a fund for the purpose of accumulations, as was the defendant in this case, fails to show, when properly called upon to account, what the actual gains have been, the usual

gains with annual rests will be charged him. *Cook v. Lowry,* 95 N. Y. 103; *Eliott v. Sparrell,* 114 Mass. 404; 1 Lewin, Trusts, 342; 1 Perry, Trusts, § 471. The court expressly remanded the case for the purpose of giving the defendant an opportunity to show what its earnings on sums so invested had been, in order that it might not be required to pay more than it had actually earned. There was no question of any other breach of trust than the mere refusal to account for accumulations, and hence no call for requiring the defendant to account for more in the way of profits than the money of plaintiffs had in fact earned in its hands. But it saw fit to refuse or neglect to disclose what its earnings had been. The rule applicable to such a situation is thus stated in 1 Perry on Trusts:

> "The burden is on the trustee to show that he made no profits, or received no benefit from the money; and if he refuses to account or to show the amounts of profits received, the court will give compound interest, in order that it may be certain that the *cestui que trust* gets the profits of the trade or business in which the trustee has employed the money." Sec. 471 and cases cited.

The plaintiffs' evidence shows that from 1867 to the time of the trial the average value of the use of money was a little more than six and one-half per cent., namely, an average of eight per cent. for the period from 1867 to 1890, and an average of four and one-half per cent. for the period from 1890 to the time of the trial. Computed upon this basis, with annual rests, the value of the $12 with accumulations amounted at the time of the trial to $172.50, and for this amount the circuit court should have entered judgment.

By the Court.—Judgment modified by inserting therein, as of June 16, 1911, the sum of $172.50 in lieu of the sum of $12, and, as so modified, affirmed, with costs in favor of appellants.

ABBOT, Appellant, vs. CITY OF MILWAUKEE and another, Respondents.

December 6, 1911—January 9, 1912.

Municipal corporations: Sidewalks: Repairing and rebuilding: Contracts: Special assessments: Milwaukee city charter.

1. No preliminary estimate or assessment of benefits or damages is required under either sec. 16 or sec. 17, subch. VII, Milwaukee city charter, before the board of public works can cause a sidewalk to be repaired or rebuilt.
2. It is not required, under said sections, that the material of the old sidewalk be used in building a new one, but a defective wooden walk may be replaced with a cement walk.
3. Nor is it required that a separate contract be let for each sidewalk to be rebuilt, but the work may be done under an omnibus contract at a certain price per square yard for all such walks as they may be ordered throughout the year.
4. The resolution of the board of public works, required by said sec. 17, declaring a sidewalk to be in a dangerous condition to persons passing over it, need not specifically state that it is "the judgment of the board" that such dangerous condition exists, nor is it essential that the board should have personally examined the sidewalk condemned.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Frank M. Hoyt,* attorney, and *Edwin H. Abbot, Jr.,* of counsel, and oral argument by *Mr. Hoyt.*

For the respondents there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* special assistant city attorney, and oral argument by *Mr. Williams.*

WINSLOW, C. J. This is an action in equity to set aside two special assessments for the building of sidewalks levied against a block of real estate owned by the plaintiff in the city of *Milwaukee,* on the ground of substantial defects and irregularities in the proceedings. The trial court concluded that the assessments were valid, and the plaintiff appeals.

The alleged defects which it is deemed necessary to treat are (1) that there was no preliminary assessment of benefits and damages as required by the city charter; (2) that if the sidewalks can be considered as having been laid under either sec. 16 or sec. 17 of subch. VII of the charter, still there was no valid assessment here, because there was no power under those sections to replace a wooden with a cement sidewalk; (3) that in any event the assessments are void because the work was not let to the lowest bidder, and because it was done under a general contract made before the work was ordered to be done.

The charter of *Milwaukee,* like many city charters, contains general provisions for the making of various street improvements, including sidewalks, which require an assessment of benefits and damages to be first made before any contract is let or work done. The charter also contains, however, two sections providing for rebuilding and repairing of sidewalks in a summary way. These sections are secs. 16 and 17 of subch. VII of the city charter of *Milwaukee* (ch. 184, Laws of 1874, as amended), which read as follows:

"Section 16. It is hereby made the duty of the board of public works with the consent of the aldermen of the proper ward unless otherwise provided by ordinance of the common council, to cause the streets, alleys and sidewalks in the city to be kept in proper repair and in a cleanly and wholesome condition at all times, and for this purpose they are empowered with the consent of the aldermen of the ward in which such street, alley or sidewalk is located, to employ the necessary labor, or to contract pursuant to law, for such cleaning and repairing as they may deem necessary for the safety and health of the people. The expense of such cleaning and repairing, except of sidewalks, shall be chargeable to and paid out of the fund of the ward in which such work is done; and the said board is also hereby empowered to cause sidewalks to be repaired, or to be taken up and relaid with new materials or with part new and part old materials, and to be restored to grade and to assess the expense thereof against the lot or piece of land in front of which such work may be done in the man-

ner provided by section 19 of said subch. VII of said chapter 184 of the Laws of 1874.

"Section 17. Whenever any sidewalk, or part of any sidewalk, shall in the judgment of the said board, declared by resolution to that effect, be in a dangerous condition to persons passing over it, for want of being repaired or remade, or on account of being above or below the grade established by the common council, the said board shall have power to order the same to be forthwith repaired or remade, and thereupon forthwith to employ fit persons to repair or remake the same for a fair price, and charge the expense thereof to the lots, parts of lots, or parcels of land abutting thereon, by a special assessment; and such assessment shall be a valid charge and lien upon such lots, parts of lots or parcels of land, without any estimate, notice, letting or other proceeding preliminary to the doing of such work, except the resolution of said board so declaring such sidewalks to be dangerous."

Counsel for the city claim that no preliminary estimate or assessment of benefits or damages is required under either of these sections, and we entirely agree with them. The sections were evidently designed to enable the city authorities to effectively perform one of their very important duties, namely, the duty to keep the sidewalks of the city in good condition at all times, without the long delays required to carry through the ordinary proceedings for improving a street. The city is thus given the power to protect the lives and limbs of its citizens and to protect itself from the payment of damages resulting from defective sidewalks as well. No narrow or contracted construction should, in our judgment, be given to these sections. We do not think that under either of them the city is required to make any preliminary assessment of benefits and damages, nor do we think that it is required to use the same material in building a new sidewalk which was in the old walk, nor to let a new contract for each walk ordered to be built.

In the present case the city replaced a defective wooden sidewalk with a cement sidewalk. It also advertised at the

beginning of the season for bids for constructing cement sidewalks as they should be needed throughout the year, and made a contract at a certain price per square yard for the construction of such walks as should be wanted from time to time upon an order from the board of public works. This contract was let to the lowest bidder, and when the sidewalks were ordered opposite the plaintiff's property the contractor was directed to build them under the terms of this previously made omnibus contract, and did so. We regard this course as entirely allowable under either of the sections named.

It seems that the board of public works deemed that they were acting under sec. 17 in ordering the construction of the sidewalks in question, for in each case they passed a resolution to the effect that the sidewalk was "declared to be in a dangerous condition to persons passing thereon" for the reasons named in sec. 17. It is objected that this resolution is ineffective, because it does not declare that it is the judgment of the board that such dangerous condition exists, and for the further reason that it appears that the board did not examine personally the sidewalks condemned, but relied on reports made to them by inferior officers and employees. We do not regard these objections as substantial.

By the Court.—Judgment affirmed.

ABBOT, Respondent, vs. CITY OF MILWAUKEE, imp., Appellant.

December 6, 1911—January 9, 1912.

Statutes: Construction: When "street" includes sidewalks: Municipal corporations: Special assessments: Invalidity: Reassessment.

1. Judicial construction of a statute is legitimate only where there is real obscurity in the meaning thereof.
2. As applied to a statute imposing an extraordinary tax burden upon a person or his property, the rule of strict construction does not require, where obscurity exists, that a meaning which will defeat the effort to impose the tax should be adopted if possible or if reasonable from any viewpoint. It means only that if there are two or more reasonable meanings within the scope of the words, giving rise to uncertainty as to which was intended, that one which does not impose the burden should be taken rather than one which does; but if, after all, the latter is more reasonable than the former, it is to be accepted as speaking the legislative intent.
3. The statute (secs. 1210*d*, 1210*e*, Stats.: Supp. 1906) providing for a reassessment of benefits and damages where a special assessment for improvements is invalid, is a remedial statute enacted to remedy the negligence and mistakes of public officers, and therefore, if open to construction at all, should be liberally rather than strictly construed.
4. Although the word "street" in its general sense includes sidewalk areas, the words "paving or repaving any street or alley, or part thereof," in sec. 1210*d*, Stats. (Supp. 1906), were clearly not intended to cover or include sidewalk improvements; and sec. 1210*e* (referring to sec. 1210*d*) is therefore not applicable to sidewalk improvements made pursuant to sec. 2, subch. VII, Milwaukee city charter, which contains language similar to that in sec. 1210*d* with reference to streets, and in addition provides specifically for the construction of sidewalks.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Action to enjoin enforcement of a special assessment tax against plaintiff's property in the city of *Milwaukee.*

The complaint was to the effect that the imposition upon the property was void for various reasons. Issue was joined by answers and the cause tried resulting in findings of fact sustaining various assigned jurisdictional defects in the special assessment proceedings and ordering judgment declaring the tax void and permanently enjoining proceedings to collect it. Defendant city appealed.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* special assistant city attorney, and oral argument by *Mr. Williams.* They contended, *inter alia,* that a sidewalk is a part of a street, and is included in "paving or repaving any street or alley or part thereof" (sec. 1210*d,* Stats.: Supp. 1906). *State ex rel. Christopher v. Portage,* 12 Wis. 562; *Chase v. Oshkosh,* 81 Wis. 313, 51 N. W. 569; *McDonald v. Ashland,* 78 Wis. 251, 47 N. W. 434; *Byington v. Merrill,* 112 Wis. 211, 88 N. W. 26; *Rosedale v. Ferguson,* 3 Ind. App. 596, 30 N. E. 156; *Board of Public Works v. Hayden,* 13 Colo. App. 36, 56 Pac. 201; *Heiple v. East Portland,* 12 Oreg. 97, 8 Pac. 907; *Marini v. Graham,* 67 Cal. 130, 7 Pac. 442; *Wiles v. Hoss,* 114 Ind. 371, 16 N. E. 800; *Dooley v. Sullivan,* 112 Ind. 451, 14 N. E. 566; *Taber v. Grafmiller,* 109 Ind. 206, 9 N. E. 721; *Gillard v. Chester,* 212 Pa. St. 338, 61 Atl. 929; *Hester v. Traction Co.* 138 N. C. 288, 50 S. E. 711; *Wabash R. Co. v. DeHart,* 32 Ind. App. 62, 65 N. E. 192; *Kohlhof v. Chicago,* 192 Ill. 249, 61 N. E. 446; *In re Burmeister,* 76 N. Y. 174; *Pomfrey v. Saratoga Springs,* 104 N. Y. 459, 11 N. E. 43; *Bloomington v. Bay,* 42 Ill. 503. The word "pavement" is a generic term, and "to pave a street or any part thereof" includes laying a cement sidewalk, since no particular material is necessary to constitute a pavement. *Little Rock v. Fitzgerald,* 59 Ark. 494, 28 S. W. 32; *McNair v. Ostrander,* 1 Wash. 110, 23 Pac. 414; *Philadelphia v. Eddleman,* 169 Pa. St. 452, 32 Atl. 639; *In re Phillips,* 60 N. Y. 16; *In re Burmeister,* 76 N. Y. 174; *In re Burke,* 62 N. Y. 224; 1 Elliott,

Roads & Streets (3d ed.) § 552; 22 Am. & Eng. Ency. of Law (2d ed.) 507; 30 Cyc. 1160, 1161.

For the respondent there was a brief by *Frank M. Hoyt,* attorney, and *Edwin H. Abbot, Jr.,* of counsel, and oral argument by *Mr. Hoyt.*

MARSHALL, J. The question for decision is this: Does sec. 1210*e,* Stats. (Supp. 1906: Laws of 1905, ch. 294), apply to sidewalk improvements in the city of *Milwaukee?* It is conceded that if it does the judgment is wrong,—that the court should have ordered a reassessment, staying all further proceedings until such order had been complied with, and rendered judgment for plaintiff or defendant according to circumstances, as indicated in such section.

Sec. 1210*e* aforesaid provides for a method of dealing with any special assessment against property for any of the purposes mentioned in sec. 1210*d,* Stats. (Supp. 1906: Laws of 1905, ch. 501), or to set aside any special assessment certificate, bond, tax sale, or tax certificate based thereon in case of the assessment in any action challenging the same being found invalid by reason of a defective assessment of benefits and damages.

Turning to sec. 1210*d* aforesaid, we find the purpose mentioned in sec. 1210*e* to be "work of constructing any sewer, or grading, graveling, planking, macadamizing, paving or repaving any street or alley or part thereof, or the curbing of or sodding along any sidewalk, or the paving of any gutter in any city," etc. Does this language include a special assessment under the charter of the city of *Milwaukee* for a cement walk?

The sidewalk in question was constructed under sec. 2, subch. VII, of the *Milwaukee* city charter. The language thereof is this: "grading, graveling and planking, macadamizing or paving to the center of any street or alley, and the grading, graveling, macadamizing, planking, paving, sodding and

curbing of any sidewalk, and the paving of any gutter." Thus it will be seen the construction of sidewalks is specifically mentioned in the charter but is not in the reassessment statutes, unless by the general language, "any street or alley or part thereof." The two provisions are substantially identical, except in the former the particular nature of the improvement is mentioned as to streets in the particular sense, and repeated as to sidewalks, "sodding and curbing" being added, and the words "or part thereof" after the words "street or alley" occur in the latter but not in the former. That is, in the charter the sidewalk area by itself is spoken of, while in the statute the same language as to character of improvement is used, but the territory is described as "any street or alley or part thereof." Was this general language used to characterize the whole street, including the sidewalk area? That is the question.

Counsel for respondent argue that because the word "street" does not, in all cases, include the sidewalks, that a rule of strict construction should be applied to relieve property, circumstanced as that in question, from a special tax burden; that a rule of strict construction in favor of the property owner applies in such cases, citing *Dean v. Charlton,* 27 Wis. 522; *Oshkosh City R. Co. v. Winnebago Co.* 89 Wis. 435, 439, 61 N. W. 1107, and similar authorities to illustrate the principle. It must not be forgotten that such cases had to do with the right to impose the tax, not the right to merely make a reassessment to determine the amount specific pieces of property were chargeable with. Further, it must be appreciated that the general principle that a law imposing a burden on a person or his property, out of the ordinary,—in derogation of the common law, must be construed in favor of the property owner, does not mean, necessarily, that such a law must be construed that way, or at all. A law is not to be examined, in the first instance, with the idea that it is to be construed, if claimed to impose an extraordinary burden on person or prop-

erty, so as to read out of it a meaning, if one can reasonably be found therein, which will defeat such purpose. It is only where there is real obscurity of meaning that judicial construction is legitimate. Ambiguity is not to be searched for or looked upon with favor in order to make way for construction. Right the reverse.

Again, even where obscurity exists in such a situation as respondent's counsel supposes to exist here, it is not the office of judicial construction to adopt a meaning if possible, or if reasonable from any viewpoint, which will defeat the municipal effort to impose the tax. If there are two or more reasonable meanings within the scope of the words, all things bearing on the question being considered, giving rise to some uncertainty respecting which was intended, then the one which does not impose the burden is to be taken rather than the one which does, but if after all, the latter is more reasonable than the former, it is to be accepted as speaking the legislative intent. The rule of strict construction insisted upon by counsel for respondent goes no further than indicated.

Really this is not a case for the rule of strict construction. The reassessment law was not one authorizing the imposition of burdens, but one to remedy the negligence and mistakes of public officers in not imposing burdens equitably and legally. It is a remedial statute rather than one restricting rights or imposing burdens and so should be liberally construed to further the purpose. *Cleveland v. Burnham,* 60 Wis. 16, 17 N. W. 126, 18 N. W. 190. It should at least be fairly construed, and sensibly construed in any event, conceding, for the point, that it is open to construction at all.

Having in mind that a statute must be found uncertain of meaning before judicial construction is proper, let us examine the law with reference to its subject matter. The language of an enactment may be somewhat obscure, when examined in its letter only, yet when read with reference to its subject and the mischief sought to be remedied, be perfectly plain, or too

plain to warrant resort to judicial construction to determine its meaning.

It must be conceded that the language of an enactment is to be taken in its general instead of particular or restricted sense, unless there is something to indicate, pretty clearly, that the latter was intended. The word "street," in its general sense, includes sidewalk areas; yet it is matter of common knowledge that such areas are devoted to a different use than that part of the street between the curbs, and, aside from exceptional cases, are improved under a different system as regards payment of the cost thereof. Rarely is it provided, or was it at the time of the enactment of the statutes in question, that the burden of such improvements should be laid, to the extent of benefits, on the abutting property. Generally speaking, the whole subject of special assessments for the improvement of streets dealt with in such statutes, other than in exceptional cases, is, or was at the time of their origin, foreign to the sidewalk matters.

Reading the law with reference to the situation indicated, yet recognizing the particular feature of the *Milwaukee* charter, and the fact that the term "sidewalk," except as to sodding along the same, was apparently with a purpose left out of the reassessment law, and the fact that words were used respecting the character of the improvements in the legislative mind specially appropriate to the street areas, between the curbs, and not ordinarily used respecting sidewalk areas,—it is the judgment of the court that the reassessment statute, pretty plainly, was not intended to deal with the latter. That result is arrived at, not by choosing between two reasonable meanings under the rule of strict construction urged upon the court's attention, but by what is considered to be the plain import of the law when read with reference to the situation and facts bearing on the subject, to which we have alluded.

By the Court.—The judgment is affirmed.

HOFF, Appellant, vs. HACKETT and another, Executors, Respondents.

December 7, 1911—January 9, 1912.

Partnership: Account against partner and third person: Interest: Intention: Question of fact: Submission without action: Judgment: Appeal.

1. Facts agreed upon and submitted pursuant to sec. 2788, Stats. (1898), some tending to show, and others to negative, an intention that interest should be charged,—are *held* to sustain a judgment of the court below to the effect that the surviving partner should not, in the winding up and adjustment of the partnership affairs, charge interest against the representatives of the deceased partner upon a certain account which stood on the firm books against such deceased partner and a third person.
2. Intention is usually a question of fact and is always such where, from other uncontroverted facts relative to intention, contradictory inferences may be drawn.
3. Where a controversy is submitted without action, pursuant to sec. 2788, Stats. (1898), no conclusion of law is necessary and the judgment determines both facts and law in favor of the party for whom it is rendered.
4. Upon an appeal in such a case the appellate court considers only the question whether there is in the stipulated facts sufficient to support the judgment.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

Frank M. Hoyt, for the appellant.

Lawrence A. Olwell, for the respondents.

TIMLIN, J. The appellant is the surviving partner of the firm of Hackett & Hoff, which consisted of himself and Edward P. Hackett, now deceased, and the defendants are the executors of the latter. The case was decided in the circuit court upon an agreed statement of facts submitted pursuant to sec. 2788, Stats. (1898). The controversy is whether a surviving partner, representing the firm or representing himself

in the winding up and adjustment of the partnership affairs, should be allowed to compute interest against the representatives of the deceased partner upon an account which stood on the firm books against the deceased partner and a third person. The partnership began August 1, 1890, and continued until the death of Edward P. Hackett on May 9, 1910. The account in question began on the partnership books in October, 1890, and continued, somewhat reduced by credits at times but on the whole increasing, up to the death of Edward P. Hackett, when the debit balance, exclusive of interest, amounted to $6,765.49. The fact that Edward P. Hackett and the appellant had each a separate and individual account on the books of the firm on which no interest was charged and that the account in question represented moneys advanced by the firm to "E. P. and J. H. Hackett," as the account in question was entitled, would have some tendency to show that the intention of the partners was to charge interest on this last mentioned account, the appellant having no similar account. But, on the other hand, the books of the firm were balanced every six months during this period of about twenty years and interest computed upon and added to the debit balance of all accounts of third persons owing the firm any substantial amount for advances, while during this period there was no interest either computed upon or charged up to this account except on one occasion when an attempt of somewhat ambiguous character was made. The account in question in 1905 showed a debit to the firm of about $5,000, and at the instance of appellant the bookkeeper computed the interest upon it, entered the amount in the journal, and without the knowledge of appellant carried this entry into the ledger as an item of said account. Appellant observing this had the charge eliminated, and, dividing the amount of interest by two, caused to be made a charge of one half of it against a separate account of J. H. Hackett and sent the latter a statement and request for payment. The other half of the interest was not charged

to any one, and there was no charge of interest left in the account in question. E. P. Hackett had no knowledge of this bookkeeping transaction, but J. H. Hackett informed E. P. of the demand upon the former for half of the interest. E. P. Hackett informed J. H. that he should pay no attention to the matter, but that he, E. P. Hackett, would attend to it. Nothing was thereafter said on the subject of charging interest on this account between the partners, and no further attempt to charge interest upon this account or any part thereof was made. There was some indefinite conversation, but nothing agreed upon, relative to the one half of the interest attempted to be charged or charged to J. H. Hackett. The probative tendency of this is to show that the partners did not intend to charge interest upon this account against E. P. Hackett. Perhaps it also tends to show that the partners did not intend to charge interest on this account against any person, taking the twenty years of acquiescence in treating this account in this respect differently from the other similar accounts on the firm books as overbearing the ambiguous attempt of 1905, which was not carried out or persisted in by appellant or apparently acquiesced in by E. P. Hackett. There are several other such items of fact among the facts stipulated. They face both ways. Some have a slight tendency to justify an inference that interest was intended to be charged. Others have a slight tendency to justify the contrary inference. Upon such a condition of the record the judgment of the circuit court must prevail.

Intention is usually a question of fact, and it is always a question of fact where, from other uncontroverted facts relative to intention, contradictory inferences may be drawn. The circuit court erroneously termed his decision a conclusion of law, but the judgment under the statute in question, sec. 2788, Stats. (1898), must be considered a determination of both facts and law in favor of the party for whom judgment is given.

In cases submitted under this statute no conclusion of law is necessary, and the judgment determines both facts and law in favor of the party for whom it is rendered. It is true the statute in question says that the court shall render judgment thereon as if an action were pending. It also says that the case, the submission, and a copy of the judgment shall constitute the judgment roll, while in ordinary litigated cases that roll is made up of the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exception, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment. Sec. 2898, Stats. (1898). Under this latter statute the court of review on appeal or writ of error, without any bill of exceptions, will consider whether the findings support the judgment. *Saukville v. Grafton,* 68 Wis. 192, 31 N. W. 719; *Blossom v. Ferguson,* 13 Wis. 75. Here we consider whether there is in the stipulated facts sufficient to support the judgment. There being such evidence, an affirmance follows.

By the Court.—Judgment affirmed.

SPIES, Appellant, vs. CHICAGO & MILWAUKEE ELECTRIC RAILROAD COMPANY, Respondent.

December 7, 1911—January 9, 1912.

Railroads: Condemnation of land: Appeal from award: Payment into court: Trial* de novo: *Verdict reducing amount: Judgment: Waiver.

1. Upon an appeal, under sec. 1849, Stats. (1898), from the award of commissioners in condemnation proceedings, the trial in the circuit court is a trial *de novo* to determine the landowner's damages, without reference to the amount awarded by the commissioners; the verdict supersedes the award; and judgment is to be rendered according to the rights of the parties, without considering which one took the appeal.

2. Thus, where the landowner appealed from the award but withdrew the amount thereof, which the railway company had paid into court, and upon the trial the verdict was for a smaller sum, the railway company, although it had not appealed, was entitled to judgment against him for the difference between the award and the verdict and for the costs of the trial.
3. The railway company does not in such a case, by failing to appeal, waive its right to insist that the verdict of the jury establishes the amount which it should be called upon to pay. *Grand Rapids v. Bogoger*, 141 Wis. 530, distinguished; *Groth v. M. N. R. Co.* 143 Wis. 537, limited.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Henry J. Killilea* and *Rodger M. Trump,* and oral argument by *Mr. Trump.*

Edgar L. Wood, for the respondent.

BARNES, J. The defendant instituted condemnation proceedings to acquire title to certain parcels of land owned by plaintiff. The commissioners awarded damages in the sum of $1,200, which amount the defendant paid into court and entered into possession of the premises. The award was filed June 21, 1907. Plaintiff appealed therefrom July 18, 1907, and on September 16, 1907, withdrew the money paid into court. Defendant did not appeal. The appeal was tried in May, 1911, and resulted in a verdict finding that the value of the land condemned was $730. Upon this verdict judgment was rendered in defendant's favor for $470 with interest thereon and costs, aggregating in all $654.41. Plaintiff appeals from the judgment and insists that defendant, not having appealed from the award of the commissioners, was not entitled to recover back the difference between the two awards.

Sec. 1849, Stats. (1898), provides:

"Within thirty days after the filing of the report of the commissioners in the office of the clerk of such circuit court any party may appeal to such circuit court from any award

made by the commissioners by filing in the office of said clerk a written notice of appeal. Upon his receiving such notice the appeal shall be considered an action pending in court, subject to a change of the place of trial and appeal to the supreme court as other actions, and shall be entered by the clerk upon the records of the court by setting down the owner or owners of the land for which such award was made and who are parties to the appeal as plaintiffs and the railroad corporation as defendant. Such appeal shall be tried by jury unless a trial by jury is waived by both parties; costs shall be allowed to the successful party on such appeal, and if in favor of the plaintiff, be added to the amount of the verdict; if in favor of the defendant, be deducted therefrom; and judgment shall be rendered thereon according to the rights of the parties."

Primarily the commissioners in condemnation proceedings determine the damage which the landowner sustains by reason of the taking of his land. Where the award of the commissioners is brought before the circuit court on an appeal by either party, the statute plainly contemplates that there shall be a trial *de novo* to finally settle the *quantum* of the landowner's damages. Such damages are ascertained without any reference to the amount found by the commissioners. The verdict supersedes the award. There is a close analogy between the situation presented on an appeal from an award in condemnation proceedings and that presented on an appeal from a justice court judgment, where relief is granted according to the rights of the parties without considering which one took the appeal. The situation is even more closely analogous to that presented in *York v. Orton,* 65 Wis. 6, 26 N. W. 166, which involved an appeal from the award of commissioners allowing a claim against the estate of a decedent. The administrator appealed and the amount of the allowance was increased on the trial in the circuit court, and this court held that the award of the commissioners had nothing to do with the judgment to be entered in the circuit court, although the claimant did not appeal. The distinction that might be

drawn between the two cases is too subtle to warrant a departure from the *York Case.*

The verdict established appellant's damages at $730. No complaint is made that the finding is not amply supported by the testimony. Sec. 1849, *supra,* requires the court to enter judgment on the verdict in accordance with the rights of the parties. Any judgment that permitted the appellant to recover or retain a larger amount of damages than $730 would not accord with the established rights of the parties. The statute contemplates that such a judgment should be entered as was rendered here. The respondent was clearly entitled to recover the costs of the trial in the circuit court. The statute says that such costs shall be deducted from the amount of the verdict. Reasonably construed, this provision means that, where the award of the landowner on appeal is less than that originally made, recovery is limited to the amount awarded on appeal, less the taxable costs. The amount of the original award having been withdrawn, it was proper for the court to enter an affirmative judgment for the difference between the first award and the second one, minus the costs of the trial in the circuit court. No other judgment would be in accordance with the rights of the parties. By not appealing the respondent waived the right to a bond before the money was withdrawn which it compulsorily deposited in court, but it did not waive the right to insist that the verdict of the jury established the amount of the damages which it should be called upon to pay.

The appellant relies principally on the cases of *Grand Rapids v. Bogoger,* 141 Wis. 530, 124 N. W. 659, and *Groth v. M. N. R. Co.* 143 Wis. 537, 128 N. W. 74. The first case is not in point. There it was held that a landowner did not waive his right to prosecute his appeal from an award of damages on account of land condemned by the city by withdrawing the amount of the award from the city treasury. This was held because it was said that the city had no right of ap-

peal, and, having no such right, was not entitled to any reduction of damages on the appeal. The statute gave the right of appeal to an aggrieved party only, and, the assessment having been made by the board of public works and confirmed by the common council, the city waived any objection to the excessiveness of the award.

In reference to the second case the following language is relied on to support the claim of the appellant:

"The idea is that, if the corporation waives its right of appeal, pays the money into court, and takes possession of the land, the landowner has, unconditionally, the right to such money and to the remedy to increase the amount as well."

This language must be read in connection with the facts before the court. The question involved was whether a party who had withdrawn the deposit made to satisfy the award of the commissioners waived the right to prosecute an appeal therefrom, and all the court intended to decide or did decide was that the landowner could withdraw the deposit and still prosecute his appeal where the railway company actually entered into the possession of the land. The judgment of the circuit court was right.

By the Court.—Judgment affirmed.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant, vs. CITY OF MILWAUKEE and another, Respondents.

December 7, 1911—January 9, 1912.

Municipal corporations: Street improvements: Special assessments: Railway property: Right of way: Pleading: Ownership.

1. In an action by a railway company to set aside special assessments against certain lands for street improvements, allegations in the complaint that plaintiff is the owner of the lots, that they are part and parcel of its right of way, that its line of railway was at the time of the assessment operated as part and

parcel of its system of railway for public use, and that the said lands constituted necessary right of way, are construed to mean that the plaintiff is the owner in fee of the lots and not of a mere easement or right of way over them.

2. Ch. 425, Laws of 1903 (sec. 1210*k*, Stats.: Supp. 1906), providing that the property of all corporations, including railway companies, "shall be in all respects subject to all special assessments for local improvements in the same manner and to the same extent as the property of individuals," is a valid enactment, and under it lands of a railway company, though used solely for a right of way, are subject to special assessments for street improvements.

3. Under said statute the land is to be considered in its general relations, irrespective of the particular use to which it may be put.

4. What was said in *Chicago, M. & St. P. R. Co. v. Milwaukee*, 89 Wis. 506, to the effect that, as a matter of law, a railway company's right of way is not benefited by the improvement of the street upon which it abuts, is overruled.

APPEAL from an order of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

Action to set aside special assessments for street improvements against plaintiff's right of way in the city of *Milwaukee*. The complaint alleges that plaintiff is the owner and operator of a system of railways, for public use, in Wisconsin and other states; that several of its lines of railway enter the city of *Milwaukee*, and have been maintained and operated, for public use, within said city, for more than twenty years last past; that it is the owner of lands lying in defendant city described as follows, to wit: (describing certain lots in said city). It further alleges, upon information and belief, that the defendant city made an assessment for special benefits against said lands for the purpose of improving Fifth street within said city; that said assessment was by a resolution of the common council of the defendant city confirmed; that thereafter the work of improving said street was let to a contractor, and after the performance of the contract the board of public works of the defendant city issued to such contractor, in payment for work done in front of said lands, its certificate for $478.02, containing among other things a description

of said lands as the lands against which said work was chargeable, and said special assessment was carried out at said sum on the tax roll of the defendant city for the year 1908 against all of said lands. It then alleges that the lands described in the complaint are part and parcel of plaintiff's right of way in defendant city, and its said line of railway was at the time of the assessment operated as part and parcel of plaintiff's system of railways for public use and the said lands constituted the necessary right of way; that the plaintiff has not paid said certificate for the reason that it is advised by its counsel and verily believes that under the facts stated in the complaint none of said lands described were by law liable to assessment for special benefits. It further alleges, upon information and belief, that the defendant *J. V. Schoenecker, Jr.,* as treasurer of the defendant city, notwithstanding the provisions of ch. 425, Laws of 1903, threatens that he will on the 1st day of February, 1909, sell the said lands described, for the purpose of collecting the amount of said certificate.

The complaint also contains a second cause of action identical with the first, except that it describes other lots and states a different amount of taxes assessed against them.

The defendants demurred separately to each of the several causes of action set forth in the complaint, on the ground that it appeared on the face thereof that the same did not state facts sufficient to constitute a cause of action. The demurrers were sustained and plaintiff appealed.

For the appellant there was a brief by *C. H. Van Alstine* and *H. J. Killilea,* and oral argument by *Mr. Van Alstine.*

For the respondents there was a brief by *Daniel W. Hoan,* city attorney, and *W. H. Timlin, Jr.,* special assistant city attorney, and oral argument by *Mr. Timlin.*

VINJE, J. The complaint alleges that plaintiff is the owner of the lots described; that they are part and parcel of its right of way; that its line of railway was at the time of the assessment operated as part and parcel of its system of rail-

way for public use, and that the said lots constituted necessary right of way. Under this allegation it must be held that plaintiff is the owner in fee of the lots described and not of a mere easement or right of way over them, though they are used only for a right of way. The question, therefore, arises: Are lands of a railway company, used solely for a right of way, subject to special assessments for street improvements? Counsel for plaintiff contend they are not, because under the laws of this state and the charter of the defendant city special assessments are limited by and cannot exceed the special benefit which the abutting property receives by reason of the improvement, and in *Chicago, M. & St. P. R. Co. v. Milwaukee,* 89 Wis. 506, 62 N. W. 417, this court held as a matter of law that the necessary right of way of a railway company is not specially benefited by the improvement of a street in front of it. They further contend that the rule of law announced in that case has not been changed by the enactment of ch. 425, Laws of 1903 (sec. 1210*k,* Stats.: Supp. 1906), which provides:

"The property of every county, city, village, town and school district, within this state, and of every corporation, company or individual operating any railroad or street railway, telegraph, telephone, electric light or power system, or doing any of the business mentioned in chapter 51 of the Statutes of 1898, and of every other corporation or company whatever, shall be in all respects subject to all special assessments for local improvements in the same manner and to the same extent as the property of individuals."

They argue that the act does not specifically prescribe the steps to be taken in making special assessments, but simply provides that the property of all corporations "shall be in all respects subject to all special assessments for local improvements in the same manner and to the same extent as the property of individuals," and hence that the statute was not meant to stand alone, but only in connection with other statutes that point out the steps to be taken in making special assessments;

that it is only when some other statutes authorize special assessments and point out the mode and manner of making them that the property of railway companies is subject thereto under those statutes to the same extent as is the property of individuals. But since the property of the latter is liable only to the extent of benefits, the right of way of railway companies is liable only to the same extent. And if, as held in *Chicago, M. & St. P. R. Co. v. Milwaukee,* 89 Wis. 506, 62 N. W. 417, right of way of a railway company is not at all benefited by the improvement of a street on which it abuts, it is therefore not in any manner or to any extent liable for special assessments for such improvement, notwithstanding the enactment of ch. 425, Laws of 1903. Such, in brief, as we understand it, is the argument of plaintiff on this point.

It is true the decision in *Chicago, M. & St. P. R. Co. v. Milwaukee* was based in part upon the fact that it could be said as a matter of law that the right of way of a railway company was not benefited by the improvement of the street on which it abuts, but the decision rested chiefly upon the ground that, in the absence of an express statute authorizing an assessment of the tracks and necessary right of way of a railway company, the assessment and sale thereof for benefits by local improvements could not be sustained, and it was held that in subd. 14, sec. 1038, R. S. 1878, exempting railroad property from taxation, the clause "except that the same shall be subject to special assessments for local improvements in cities and villages," was not a sufficiently specific declaration of legislative intent to subject it thereto, as the section was intended merely to confine the exemption to the subject of general taxation. So it will be perceived that if the court had found in the statutes a sufficiently clear declaration of legislative intent to subject railroad property to special assessments, the decision would have been otherwise. That case was decided in 1895. Subsequently the legislature enacted ch. 425, Laws of 1903 (sec. 1210*k*, Stats.: Supp. 1906), and

in *Chicago, M. & St. P. R. Co. v. Janesville,* 137 Wis. 7, 118 N. W. 182, this court had occasion to consider the effect thereof. It referred to the case of *Chicago, M. & St. P. R. Co. v. Milwaukee,* 89 Wis. 506, 62 N. W. 417, and used this language with reference thereto and the enactment of the subsequent statute:

"In the discussion of the question it was said that the principle is established that 'such a result cannot be effected under the power of taxation *without express legislative authority,* and that general language in such statutes will not be held to authorize such a result.' Since the decision of that case, however, the legislature has in no uncertain terms made express provision for the levying of such assessments against such property. Ch. 425, Laws of 1903, provides, among other things, that the property of railroad corporations 'shall be in all respects subject to all special assessments for local improvements in the same manner and to the same extent as the property of individuals.' This is an express and unambiguous declaration by the legislature upon a subject over which it has full power, which closes the question."

While the language was used in a case that did not from necessity involve the question, because the assessment for the sewer was also sustained under the exercise of the police power irrespective of special benefits, still it correctly expresses the purpose and power of the legislature in the enactment of ch. 425, Laws of 1903. What was said in *Chicago, M. & St. P. R. Co. v. Milwaukee, supra,* to the effect that it is clear as a matter of law that a railway company's right of way is not benefited by the improvement of the street upon which it abuts, must be deemed to be overruled. Such legislation is in accord with the result in many well considered cases, and is in harmony with the rule approved by the supreme court of the United States that on the question of benefits or no benefits the land shall be considered simply in its general relations and apart from its particular use. *Louisville & N. R. Co. v. Barber A. P. Co.* 197 U. S. 430, 25 Sup. Ct. 466; *Ill. Cent. R. Co. v. Decatur,* 147 U. S. 190, 13 Sup. Ct. 293;

Seattle v. Seattle & M. R. Co. 50 Wash. 132, 96 Pac. 958; *Burlington & M. R. R. Co. v. Spearman,* 12 Iowa, 112; *Heman C. Co. v. Wabash R. Co.* 206 Mo. 172, 104 S. W. 67, and cases cited in *Chicago, M. & St. P. R. Co. v. Milwaukee,* 89 Wis. 506, at page 517, 62 N. W. 417, and note to same in 28 L. R. A. 249.

It was decided in *Weeks v. Milwaukee,* 10 Wis. 242, that special assessments by municipalities do not come within the rule requiring uniformity of taxation, because art. XI, sec. 3, of the constitution authorizes the legislature to restrict the power of assessments of cities, and that the legislature is the sole judge of the extent to which such power of levying special assessments may be exercised by cities. Acting strictly within that power it has declared that the property of all corporations "shall be in all respects subject to all special assessments for local improvements in the same manner and to the same extent as the property of individuals." Such a declaration, interpreted in the light of judicial decisions and recent legislative enactments, can mean only what its plain language imports, namely, that every species of real property owned by corporations shall pay its proportionate share of special assessments for local improvements in the same manner and to the same extent as the property of individuals, irrespective of the particular use to which such real property may be put.

By the Court.—Order affirmed.

TIMLIN, J., took no part.

KACZMAREK, by guardian *ad litem*, Respondent, vs. GEUDER, PAESCHKE & FREY COMPANY, Appellant.

December 7, 1911—January 9, 1912.

Master and servant: Injury from machinery: Involuntary and automatic act of operator: Formation of habit: Warning of danger: Duty of master: Questions for jury: Evidence: Expert testimony: Hearsay: Common knowledge.

1. The rule that an employer owes a duty of warning to an employee set at work at a machine in the operation of which there is a concealed danger which the employer knows or ought to know about, but of whose existence the employee does not and in the exercise of ordinary care cannot know, applies as well where the danger comes from an involuntary and automatic act of the employee resulting from the necessary routine movements in operating the machine (such as the pressing down of a treadle in the operation of a punch press) as where it results from some unexpected movement of the machine itself which could not be foreseen by the employee.
2. Where a boy about seventeen years old, having little previous experience with a punch press, was set at work punching small pieces of tin, each in a single operation, at the rate of about thirty-five a minute, and was told to look out and not get his fingers cut off, and also told that should a piece of tin stick in the die after being punched he should take another piece of tin and remove it, and was injured by reason of an involuntary movement of his foot pressing down the treadle while he was attempting to remove a piece of tin as instructed, it was for the jury to say whether such psychological or physiological danger existed, and whether the defendant or plaintiff or both were chargeable with knowledge of it.
3. Testimony of physicians who had made a special study of the brain and nervous system, to the effect that the continuous operation of a punch press in the usual manner is likely to produce an involuntary sequence of muscular activities which will become automatic and proceed without express brain action or will power, was within the field of expert evidence and was competent as tending to prove one material fact, namely, the existence of the danger.
4. Evidence that numerous similar accidents had occurred in the same factory through a period of years, with perfect machines, the injured employees claiming that the presses repeated without any pressure upon the treadle, was both competent and of

probative force upon the question of the employer's duty to know and give warning of such danger.

5. Testimony of one who had been superintendent in another factory as to the results of his own observation of operators at work at similar machines, also that of a state factory inspector as to knowledge obtained from personal observation and by talking over the subject with foremen, was competent upon the same question.

6. Common knowledge must of necessity be largely obtained from talking with others.

7. The objection that a warning against such an involuntary sequence of muscular activities would be of no avail cannot be considered as tenable. The duty to warn is not lessened by the fact that the warning may fail of its purpose through inattention or disobedience on the part of employees.

APPEAL from a judgment of the circuit court for Milwaukee county: OREN T. WILLIAMS, Circuit Judge. *Affirmed.*

This is an action to recover for personal injuries. On the 28th of June, 1910, the plaintiff, a boy sixteen years and eleven months of age, who had reached the seventh grade in the public schools, was set at work by the defendants operating a stamping machine or press at their tinware factory. He worked from 7 o'clock a. m. through the morning hours without difficulty, but a few minutes after commencing work in the afternoon he lost two fingers of his right hand by their being caught between the die and the punch. The machine was what is called a Bliss press, is used for stamping small pieces of tin and sheet steel, and consists in part of a die and punch. The face of the die is upward. The operator stands in front of the machine and calls the power into action by stepping with his right foot upon a treadle near the floor. One pressure of the foot upon the treadle causes the punch to come down upon the die, then rise to a point about five inches above the die and stop. If the operator steps upon the treadle and immediately removes his foot the punch will descend but once if the machine be in perfect order, and it was admitted in the case that it was in perfect order at the time.

"Prior to his injury the plaintiff worked in a stove factory three months, making elbows. He worked in a bed factory,

at all sorts of work, for about a year, but did not use machinery. Afterwards he operated for one month a press, something like the one by which he was injured. After that he went to the defendant and asked for work, and defendant's foreman asked him whether he had ever worked on a punch press, and he said that he had. He was set at work with the press by which he was injured, and when he was set at work the foreman said to him: 'Be careful you don't cut your fingers off.' The foreman showed him how to work on the press. He took a number of pieces of tin in his left hand; took one of them from his left hand with his right hand and placed the tin on the die; stepped on the treadle and removed his foot. One revolution pressed the tin into the required shape and threw it off the die, but the foreman told him that a piece of tin might stick to the die after it was pressed, and that he should, if that happened, take one of the pieces of tin that was to be stamped and loosen the tin and throw it off the die."

When working at ordinary and usual speed the machine stamped about thirty-five pieces of tin per minute. The plaintiff proceeded to operate the machine as directed successfully through the morning hours, and stopped at 12 o'clock for a recess of twenty-five minutes. Three minutes after he commenced work again in the afternoon a piece of tin already stamped stuck on the die, and with his right hand he took one of the pieces of tin which he held in his left hand, and attempted to push out the piece of tin which was stuck on the die, and it slipped so that his fingers went under the punch. At the same time his foot involuntarily came down upon the treadle, the punch descended and cut off his fingers. So far as the evidence shows, this seems to have been the first time in his experience that a piece of tin, after being pressed, remained fast on the die.

The plaintiff's claim in brief is that his injury resulted from the automatic action of his foot, as the result of a habit formed by the continuous and repeated operation of hands and foot in the same order; that he did not know or understand that such a habit would be formed, and that his employer

either did know or ought to have known the fact, and should have warned him thereof; and not having done so was guilty of negligence which was the proximate cause of his injury.

The jury returned a general verdict for the plaintiff, and the defendant appealed.

C. H. Van Alstine, for the appellant.

For the respondent there was a brief by *Doerfler, Green & Bender,* and oral argument by *Christian Doerfler.*

WINSLOW, C. J. When an employer sets an employee at work at a machine in the operation of which there lurks a concealed danger which the employer either knows or ought to know about, but of whose existence the employee does not know, and cannot know by the use of ordinary care, the employer is guilty of negligence if he give the employee no sufficient warning thereof, and if under such circumstances the employee suffers injury by reason of such concealed danger, while himself exercising ordinary care, the employer's negligence is actionable. These principles are so familiar that citation of authorities is unnecessary, and they apply with greatest force to young and inexperienced employees. Whether the danger result from some unexpected movement of the machine itself which could not be foreseen by the employee, or whether it result from an automatic and involuntary action resulting from the necessary routine movements in the operation of the machine, can make no logical difference with the principle itself. The latter danger may be far greater than the former. It is true that it will probably be easier of ascertainment, and hence the cases may perhaps be rare where the employee can be held to be excused from not knowing of the danger of the formation of the habit; but unless the court can say as matter of law that he must or ought to have known the danger, the principles requiring warning by the employer who knows or ought to know must logically apply to the latter case as well as to the former. The things of the mind are

often just as real and just as important as the things of iron or steel.

The present case, though in some degree novel, is quite simple. The plaintiff's claim is, in brief, that the monotonous and continuous repetition of the same movements of hands and foot in regular order, minute after minute and hour after hour, tended to produce and did produce an automatic unconscious action or habit, called, if you please, a sequence of muscular activity, as a result of which the muscles continued to act involuntarily and without action of the brain; that the fact that such results follow from the constant repetition of the same movements in the same order is well known to scientists and ought to be known to employers using such machines; and that this unconscious habit or involuntary sequence of muscular activities was not known by him and was the proximate cause of his injury. He points to the fact that when a piece of tin sticks on the die there is no substantial change in the sequence of movements up to the time of the pressure of the foot. The right hand still continues to move as before, taking a piece of tin from the pile in the left hand, advances it toward the die, and just as it gets to the die the pressure of the foot, which has for hours been made just at that time and in that order, must naturally come. By their general verdict for the plaintiff the jury necessarily found that there was a concealed danger, that the employer either knew or ought to have known of this concealed danger, that the employee did not know it, and could not have ascertained it by the exercise of ordinary care, and that the concealed danger was the proximate cause of the accident.

We cannot say as matter of law that this psychological or physiological danger may not exist and be just as real a danger as a danger resting in some unexpected movement of the machine itself; nor can we say in this case as matter of law either that there was no evidence to charge the defendant with knowledge of the danger, or that the plaintiff must be

charged with knowledge thereof; hence the question was necessarily one for the jury, and unless there were prejudicial errors in the admission of evidence or the submission of the case in the charge the judgment must be affirmed.

No complaint is made of the charge, and really the only substantial contentions in the case are (1) that there was no sufficient competent evidence to show that the defendant either knew or ought to have known that such a habit was likely to be formed, and (2) that no warning which could have been given would be likely to have any effect so long as the movement is involuntary.

Among other evidence relied on by the plaintiff to show the likelihood of the formation of such unconscious habit and that the defendant ought to have known of the danger of its formation was the evidence of two physicians who had made special study of the brain and nervous system. These gentlemen testified, against objection, in answer to hypothetical questions, that in their opinion the continuous operation of the machine in the manner required would be likely to produce an involuntary sequence of muscular activities which would become automatic and proceed without express brain action or will power. This testimony seems to us fairly within the field of expert knowledge. The objection that it does not follow from this fact that employers using presses know that such automatic action would result does not make the testimony incompetent. If the testimony tends to prove that such automatic action will be likely to result, it tends to prove one material fact. The question whether employers ought to know that fact must also be proven, but that need not necessarily be proven by the same evidence.

As tending to prove this second necessary fact it was shown by sufficient evidence that more than one hundred of this style of press were in use in defendant's establishment, and that accidents of this nature have been frequently occurring every year for many years, and for the last three years at the

rate of twenty a year; that is, accidents where employees would get their fingers cut off or mangled in perfect machines, and claim that they did not touch the treadle, but that the punch came down a second time without action of the foot. Of course, this was an impossibility with a perfect machine, as pointed out in the case of *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, 71 N. W. 434.

It is said that this testimony has no probative force on the question of the employer's duty, but we cannot agree with this contention. It is true that an employer is not an insurer of the safety of his employees, but he owes them the duty of providing reasonably safe machinery, and using ordinary care at least to discover concealed or latent dangers in its use, and especially does he owe this duty to minors. If, year after year, these accidents have been going on with perfect machines, and no sufficient explanation, it seems to us entirely proper for that fact to be shown in order that the jury may say whether or not the employer ought not to have investigated and ascertained the cause. That investigation and careful study would have led to the obtaining of the information brought out in this case there can be little doubt. The evidence showed that at least one shop superintendent in Milwaukee using similar machines had known of the unconscious muscular habit likely to be formed in the use of such machines for nearly twenty years. Mr. Wolter, who was shop superintendent in the tinware establishment of the Kieckhefer Bros. Co. for a number of years prior to 1899, testified that there were in use in the factory numbers of these same machines; that he himself discovered the danger of the formation of the habit, and that he warned every beginner at such a machine of the danger of forming the habit and of forgetting himself and stepping on the treadle; and that he also warned him if the piece of tin stuck in the die, then he should stop at once and notify the foreman in his department.

This seems to be pretty conclusive proof that an employer who was inclined to pay attention to the question and devote thought to it could solve the mystery of these numerous and constantly recurring accidents with perfect machines. At least it is in our judgment evidence from which the jury could so conclude. There was some additional evidence on this point given by William Straub, a state factory inspector, whose duty for three years has been to investigate accidents in factories of this kind. He testified that it was matter of common knowledge among employers using presses of this kind that an operator will very often unconsciously set the treadle in motion with his foot at a time when he has skipped a feed with his hands. He testified further that he obtained his knowledge from seeing such involuntary movements by operators himself and by talking it over with foremen. The objection that the knowledge obtained by talking with foremen is incompetent cannot be sustained. Common knowledge must largely be obtained from talking with others.

We conclude that there was sufficient evidence to take to the jury both the question as to the formation of such an unconscious habit, and the question whether the likelihood of its formation should have been known to the defendant.

The objection that no warning would be of any avail cannot be considered as tenable. Many warnings fail in their purpose owing to inattention or disobedience on the part of employees, nevertheless the duty to warn is not thereby lessened. If every operator were told of the danger of the formation of the habit and the imminent risk of injury thereby, and enjoined to step back from his machine a step whenever the feed missed from any cause, so that there would necessarily be a conscious and complete break in the sequence of muscular activities and a practical impossibility of placing the foot on the treadle, who can now say how many such accidents would be prevented? Certainly every employee who

followed the directions would be safe. And if no more than twenty-five per cent. of the employees followed them the result would be well worth the trouble. We are unable to say that a warning of this kind would be of no avail.

By the Court.—Judgment affirmed.

MARSHALL and VINJE, JJ., dissent.

OTTO, Respondent, vs. MILWAUKEE NORTHERN RAILWAY COMPANY, Appellant.

December 8, 1911—January 9, 1912.

Electric railways: Negligence in starting car: Injury to licensee on steps: Duty of conductor: Contributory negligence: Evidence: Rules of company: Expert testimony: Cause of injury: Instructions to jury: Damages: Married women: Excessive damages.

1. In an action for injuries sustained in falling from the steps of an electric car, where the proof showed that the car was equipped with modern appliances so that it could be started without any jerk, but that at the time in question it was started so suddenly as to throw a seated person violently back and to put one who was on his feet in danger of falling unless holding to something for support, a requested instruction to the effect that the mere sudden starting of an electric car is not in itself sufficient proof of actionable negligence, that affirmative proof is necessary of an unusual jerk, and that mere statements of a witness that the start was violent or sudden is not sufficient, was inapplicable.
2. Persons boarding passenger cars to see relatives and friends off and to assist them if necessary, in accordance with a common custom, are licensees and entitled to be treated with ordinary care by those in charge of the cars.
3. It is the duty of those in charge of an electric car to use reasonable diligence, before starting it, to discover whether a person who has stepped upon the car has mounted to the platform or stepped back to the ground.

4. A person is not guilty of want of ordinary care, as matter of law, in stepping upon the lower tread or proceeding to the platform of an electric car, with both hands engaged in carrying parcels.
5. In an action for injuries to a licensee by the sudden starting of an electric car while she was standing upon the steps, a rule of the company for the guidance of its servants requiring them to exercise the highest degree of care in handling cars to avoid injuring themselves or others, imposed a higher degree of care than the law required and was not admissible in evidence; but error in admitting it was not clearly prejudicial, the jury having thereafter been emphatically instructed that the company owed the plaintiff the duty only of exercising ordinary care for her safety.
6. In such action it was error to permit a physician who had attended plaintiff to testify that the fracture of her arm might have been caused by falling from a street car—that not being a subject for expert testimony; but, there being no question but that the arm was in fact broken in that way, the error was harmless.
7. If defendant's servants in charge of the car did not know of plaintiff's perilous situation on the steps or were not chargeable with knowledge thereof, that fact did not displace the duty to exercise ordinary care for her safety, but merely bears upon the question whether there was a breach of such duty in starting the car.
8. Where no limit to the amount recoverable for an injury is fixed by law, the trial court should not instruct the jury that the damages, if any, must not exceed a certain amount, even though such amount is that named in the prayer for relief. The prayer does not govern or limit the amount of recovery, and such an instruction is likely to mislead the jury.
9. Recovery by a married woman for a personal injury, treated at the expense of her husband, is limited to reasonable compensation for suffering past and future, so far as discovered by the jury to a reasonable certainty.
10. In an action by a married woman to recover for personal injuries, the admission of evidence indicating that a loss of earning power was a part of her loss, in the absence of careful instructions to the jury that no element of lost earning power should be included in the damages, was misleading.
11. An award of $2,000 in such a case to a married woman fifty-five years of age for an ordinary fracture of the radius of the left arm near the wrist, which ran the ordinary course of such an injury to a substantial recovery in a few weeks, is reduced to $1,200.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

Action to recover compensation for personal injury.

Plaintiff accompanied her son, his wife and two children, and the wife's sister, to assist them, particularly the wife and children, to take passage on defendant's car. All but plaintiff intended to board the first car going their way. She carried a basket in one hand and some baby clothes in the other. As a car was seen approaching she efficiently signaled it to stop. Upon the car coming to a stand the party proceeded to enter; the man carrying a grip, leading. When all were aboard but plaintiff, she stepped upon the first tread to enable her to place the basket and clothes on the platform. As she was in the act of doing, or had just done, so, the conductor not being present to assist or in sight from her location, so far as she observed, the car, without any signal having been given, suddenly started with a jerk precipitating her to the ground, breaking her arm, and considerably disturbing other members of the party.

The cause was submitted to the jury, resulting in a verdict, holding defendant liable for negligent breach of duty to plaintiff in starting the car in the manner and under the circumstances mentioned, causing injury to her without any efficient contributory fault, and assessing her damages at $2,000. Judgment was rendered accordingly.

For the appellant there were briefs by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *James G. Flanders,* of counsel, and oral argument by *James G. Flanders.*

For the respondent there was a brief by *W. B. Rubin,* attorney, and *W. B. Rubin* and *H. B. Walmsley,* of counsel, and oral argument by *Mr. Rubin.*

MARSHALL, J. This is not a case within the class illustrated by *Wickert v. Wis. Cent. R. Co.* 142 Wis. 375, 125 N. W. 943, and the like, dealing with a situation created by a

person entering a railroad car as a licensee to see another off on a journey, and the railroad company's servant, not knowing or having reasonable ground to anticipate the entry is with the intention of going back before the starting time, efficiently signals for the start, resulting in such person being injured in his effort to leave the car. Had respondent here reached the platform before the car started and then returned to the lower step and dropped from it by reason of the car suddenly starting, such cases might cut some figure.

Neither is the case before us within the class illustrated by *Boston E. R. Co. v. Smith,* 168 Fed. 628, and similar cases which deal with the situation of a person who has boarded a car to the platform, and the car is started with the usual disturbance so that before he has time to reach a seat he is injured by being thrown about somewhat.

Just as plainly this is not within the class illustrated by *Hill v. L. & N. R. Co.* 124 Ga. 243, 52 S. E. 651, and the like, dealing with a situation of a person who has boarded a car to see some one off and is injured in trying to leave on account of the car starting without previous signaling, as was customary, to give a person so circumstanced opportunity to return safely to the outside.

Independently of the particular location of respondent at the time the car started, precipitating her to the ground, the case is not within the class illustrated by *Boston E. R. Co. v. Smith, supra,* and the like, therein referred to, relied upon by counsel for respondent, dealing with ordinary reasonably necessary jerking of an electric car in starting; (1) because they have reference to the effect of such ordinary jerking after a person has reached the platform, whereas here the respondent was on the lower step of the car where a sudden start would naturally imperil one's safety; and (2) because the evidence shows that there was something more than ordinary jerking. There was a violent start,—one that disturbed, abnormally, passengers who were seated. Moreover, while

it may be that some years ago an electric car, ordinarily, when properly handled, started with a jerk so such movement was to be expected, that is not the case now, necessarily, since by use of modern improvements, with which the proof shows the car in question was equipped, no such violent movement of the car was necessary so far as the manipulation of the appliance itself was concerned.

For the reason stated the instruction asked to the effect that the mere sudden starting of an electric car is not in itself sufficient proof of actionable negligence,—that affirmative proof is necessary of an unusual jerk, and that mere statements of the witness that the start was violent or sudden is not sufficient, so far as good law, does not apply to the case. Here the proof was that the car could be started without any jerk, but was in fact started so suddenly as to throw a seated person violently back and endanger one who was on his feet of falling unless holding to something for support.

There is little use in going further by way of reviewing cases cited by either side. It is doubtful if any of them throw any light on this case as regards similarity of facts, or in principle bear on it, except by way of illustrating and declaring what is freely conceded by respondent,—that it is such common custom, submitted to by passenger transportation companies, for persons to board cars to see relatives and friends off, and assist them when necessary, as in this case, that in doing so they are licensees and entitled to be treated by those in charge of cars with ordinary care.

Respondent was not guilty of any want of ordinary care, as matter of law, merely because she stepped upon the lower tread of the car. Defendant is not excusable for starting the car while she was in that position because its servants had no reason to anticipate that she did not do so as a passenger. Had she been such, to have suddenly started the car while she was so circumstanced would, at the best for appellant, have admitted of a reasonable inference of want of due care, if

those in charge of the car knew, or ought reasonably to have known, of her situation. Obviously, it is the business of a railroad company to use reasonable diligence to discover whether a person who has stepped on a car has mounted the platform or stepped to the ground before starting. It seems there was room in the evidence for the jury to conclude that there was a fatal omission of defendant in that regard.

True, respondent was badly incumbered, having neither hand free to help or save herself in case of her equilibrium being disturbed by a motion of the car or otherwise. But it cannot well be held that a person is guilty of a want of ordinary care, as matter of law, in stepping upon the lower tread of a car or proceeding to the platform with both hands engaged in carrying parcels. On the whole, it seems that there is no sound basis in the record for holding that the trial court was clearly wrong in submitting the question of actionable fault of appellant and that of contributory fault of respondent, to the jury.

Complaint is made because the court admitted in evidence a rule of the company for the guidance of its servants, requiring them to exercise the highest degree of care in handling cars to avoid injuring themselves or others. Obviously, that had nothing to do with the case. The law, not any rule of the company, was the test of defendant's duty. Moreover, no such duty as that indicated by the rule, is legally required as regards a mere licensee. Why the trial court permitted the introduction of a matter so very foreign to the case, is not perceived. Moreover, why the illegitimate character of the evidence was intensified by the court, upon objection being made, remarking: "I cannot see that that does anything more than declare what the law would declare, but I think I will overrule the objection to that." The jury may well have gotten therefrom the idea that the law required the high standard of care mentioned in the rule as regards the personal safety of a mere licensee like respondent, which, of course, is

not the fact. The court evidently emerged from the delusion in that regard before the close of the trial, since we find the jury were very emphatically instructed that appellant owed the respondent the duty only of exercising ordinary care for her personal safety. Whether that wholly cured the error so as to render it nonprejudicial, is not free from difficulty.

Error is assigned because the court permitted a doctor, who attended respondent, when on the stand to give evidence as to the nature of her injury as he found it and the course and result of his treatment, to testify that the fracture of her arm might have been caused by her falling from a street car. No justification appears for allowing that. It was not a subject for expert evidence. True, there was no question but that respondent's arm was broken by a fall from the car, as alleged; so the error was probably not harmful. But such error and others in this case, which are so plain that it seems they ought not to have occurred, lead us to remark that the beneficial policy established by the Code and so often vindicated by the court of disregarding as inconsequential, all errors which do not prejudicially affect the substantial rights of the adverse party, in that had they not occurred the result might, within reasonable probabilities, have been more favorable to him, should not lead to inattention at the trial and promote the commission of error. It should stimulate careful rather than inconsiderate administration.

Complaint is made because the jury were instructed, in effect, that the defendant owed respondent the duty of ordinary care. Why such complaint is made is not appreciated. Of course such duty was owing to respondent. If defendant did not know of her perilous situation, or have such reasonable ground to know it as to be chargeable therewith, that merely bears on whether there was a breach of duty in starting the car. It does not displace the duty itself.

Further complaint is made because the court instructed the jury that if plaintiff was entitled to recover at all, her dam-

ages should be fixed at such sum as to fully compensate her for all damages she sustained by the injury, not exceeding in amount the sum of $5,000.

Why was such an instruction given? This court has, as counsel for appellant suggest, pretty plainly advised against such a practice. *Hupfer v. Nat. D. Co.* 127 Wis. 306, 313, 106 N. W. 831. The law placed no such limit as a guide for the jury. The pleading placed no such limit. True, the prayer was for $5,000, but that did not govern the amount of the recovery. It might have been more if the evidence warranted it notwithstanding the prayer. Why refer to the matter at all, especially in such a case where the danger is ever present of overestimating reasonable recoverable damages? Often a jury award, in such a case, is reduced by the trial judge and by this court, and sometimes by the latter after a reduction in the initial jurisdiction, while necessity for disturbing the verdict because of inadequacy very seldom occurs.

Jurors are liable, unless carefully cautioned, to be moved by sympathy, and this is said in no spirit of criticism. The steadying hand of a thoughtful, practical, appreciative judicial head is no more needed in any field of trial work than that of such cases as this.

Why needlessly use language in charging a jury, which has been treated with disfavor here and is plainly liable to convey a false prejudicial notion? The jury might well have inferred they were at liberty on the evidence to place the damage as high as $5,000, if they thought best. What other conclusion could they reasonably have come to? They must have thought that the limit of $5,000 was mentioned for some purpose of an obligatory nature.

So far as the result of the trial was to find appellant guilty of actionable negligence, it is thought no clear prejudicial error occurred which was not cured before verdict.

Turning to the amount of the damages, $2,000, in view of

the situation of respondent it looks large. The nature of the charge seems to account for it. She was a married woman about fifty-five years of age. Much evidence was elicited going to show that she was incapacitated for work for a considerable period and that her ability in that regard had not been fully restored at the time of the trial. That evidence does not seem to have been produced merely to show infirmity in the arm with attendant pain, caused by the accident. It was not directed particularly to that but to the effect of the injury upon respondent's working power as if that were part of her loss. That may well have misled the jury, since such loss was not hers but her husband's. The jury were not carefully instructed so as to guard against danger from evidence of that kind, but rather the contrary, in being told that they would find for plaintiff full loss not to exceed $5,000. True, the court instructed in general language not to include any element of lost earning power, but such element was not expressly excluded, so it is not certain that it was not included, as the jury understood the matter.

The injury consisted of an ordinary fracture of the radius of the left arm near the wrist. It was treated promptly and scientifically, and, of course, at the cost of the husband. There is no definite evidence that there was any other injury than that mentioned. It was painful, but not unusually so. It ran the ordinary course of such an injury to a substantial recovery in a few weeks. She walked to the place where she was treated and returned without assistance. She was treated by a surgeon some six or seven times. A careful scrutiny of the evidence fails to disclose anything indicating that the injury was attended with any very material special difficulty. It was ordinary of its kind. Reasonable compensation for suffering, past and future, so far as discovered by the jury to a reasonable certainty, was the utmost she was entitled to,—no pay for expense of restoration of the arm or reimbursement for lost earning power. Compensation upon the basis of a full equivalent in dollars for pain and suffer-

ing was impossible. An attempt to award it would have been unjust. *Guinard v. Knapp, Stout & Co. Co.* 95 Wis. 482, 490, 70 N. W. 671. The $2,000 was equivalent to an annuity for the woman of about $13 per month for life. We cannot escape the conclusion that had there not been unguarded language used the assessment might have been as low as $1,200, and that an unprejudiced jury, properly instructed, in case of another trial might, within reasonable probabilities, assess as low a sum. It seems that to permit respondent to take judgment for any greater sum than that regardless of the wishes of appellant, would violate the right of trial by jury. *Rueping v. C. & N. W. R. Co.* 123 Wis. 319, 101 N. W. 710; *Heimlich v. Tabor,* 123 Wis. 565, 102 N. W. 10.

By the Court.—The judgment is reversed, and the cause remanded with directions to allow plaintiff to take judgment for $1,200 and costs, if she elects to do so by motion therein on notice to the opposite counsel within sixty days after the *remittitur* reaches the court below, and in case of such election not being so made then for a new trial.

KATZ, Respondent, vs. MILLER and others, Appellants.

December 8, 1911—January 9, 1912.

Trusts and trustees: Authority of managing trustee: Evidence: Acts binding on co-trustee and on successors: Landlord and tenant: Covenants against assignment and subletting: Waiver: Estoppel: Appeal: Dismissal: Stipulation.

1. The authority of one of two testamentary trustees to act for and bind the other in the management and leasing of real estate may be established by the direct testimony of such managing trustee as to the authority given him, coupled with proof of acquiescence and assent on the part of the other in his acts.
2. Acceptance of rent by the lessor from an assignee of the lease, with knowledge of and oral assent to the assignment, constitutes a waiver of the breach of the covenant in the lease against assignment without the written consent of the lessor.

3. Such acceptance of rent after knowledge that the premises have been sublet is also a waiver of prior breaches of the covenant against subletting.
4. A waiver by trustees of the breach of a covenant against assignment in a lease of trust property, operates to discharge the forfeiture both as to them and as to their successors in office.
5. Where the assignee of a lease submitted to the lessors his plan for changes proposed to be made in the building to fit it for use as a store and offices, to be sublet by him throughout the term of the lease, and with their knowledge and consent expended a large sum in carrying out such plans, and such lessors continued for a number of years to accept rent with knowledge of subletting by him, they are estopped from enforcing a subsequent forfeiture for subletting to a new tenant.
6. Where, pending an action by the assignee of a lease to restrain the lessor from enforcing an alleged forfeiture for breach of a covenant against assignment and subletting, the parties made a stipulation by which they evidently intended to preserve to each the right to prosecute the action to a final determination, an appeal by the lessor from an adverse judgment will not be dismissed on the ground that, after appealing, he gave notice of termination of the tenancy under certain provisions of the lease, thus recognizing it as a subsisting contract and leaving nothing to be adjudicated in the action.

APPEAL from a judgment of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

Edward H. Brodhead was the owner of certain real estate located at 89–91 Wisconsin street in the city of Milwaukee. He died in 1890 leaving a will under which these premises were left to Frank G. Bigelow and Julia L. Chaffee in trust during the life of Julia L. Chaffee. In December, 1902, Bigelow and Chaffee as trustees, the remaindermen joining, executed a lease of these premises to one Phillipsborn for a term of ten years commencing May 1, 1904. The lease contains a covenant against underleasing the premises or assigning the lease without the written consent of the lessors.

Phillipsborn had intended to use the building on the premises, which is a three-story brick building, for a cloak and suit store, but abandoned this idea and requested the plaintiff to take an assignment of the lease. This plaintiff agreed to do,

provided the consent of the lessors should be obtained. The facts relating to such consent are as follows: An agent of Phillipsborn, one John E. DeWolf, talked with Bigelow, and Bigelow told him that he would consent to the assignment and the subletting of the premises, provided the tenants were satisfactory. Plaintiff proposed to Bigelow to make changes in the building so as to prepare the ground floor for stores and the second and third floors for offices, and Bigelow said he would approve the proposed changes in the building if the guarantors on the lease to Phillipsborn would continue as guarantors under the assignment. The lease provided that proposed changes in the building should be approved by Bigelow and that the guaranty of the sureties was to terminate when the lessee had expended $4,000 in making the changes. The guarantors consented to the assignment. Among the proposed sublessees was the United Cigar Stores Company, and certain changes in the building were desired. These changes, together with other changes which would make the building fit for an office building, were submitted to Bigelow and approved in writing by him. There was evidence on the trial of this action tending to show that Bigelow had signed a consent to the subleasing to the cigar company, but no such writing was produced. Five thousand dollars was expended in remodeling the premises to make them suitable as an office building, and the plaintiff sublet all but one room in the building and paid his rent to the lessors.

There was evidence that Miss Chaffee was of advanced years and was not experienced in business affairs. Mr. Bigelow testified, in effect, that she intrusted all of the trustee matters to him and that with her acquiescence he acted practically as the sole trustee. In July, 1905, Bigelow and Chaffee resigned their trusteeship and *George P. Miller* was appointed trustee. While Bigelow and Chaffee were trustees the rent was always paid by the plaintiff or his agent to Bigelow, sometimes by a check payable to Bigelow and sometimes,

and always at last, by checks payable to the bank with which Bigelow was connected. The payments were credited on the books of the estate by a clerk and the receipts describe the lease as the Phillipsborn lease. After *Miller* became trustee the rent was collected by his agent until 1908, when *Miller* first learned of the assignment. It appeared that *Miller* knew that the premises were being sublet to various tenants before he became trustee and up to the time when he refused to receive rent from the plaintiff.

In May, 1909, *Miller* and the remaindermen notified the plaintiff and his tenants to quit the premises, and in their action against them for unlawful detainer alleged as the grounds for the action that the covenant of the lease to Phillipsborn against assignment and subletting had been violated. The plaintiff then began action to enjoin the trustee and the remaindermen from bringing any action to declare the lease forfeited because of the breach of the covenants against assignment and subletting.

Upon the evidence tending to establish the facts as stated in the foregoing the court found, among other findings, as follows:

"III. The said Julia Chaffee is and was at the time of the leasing of said premises and execution of said lease, a woman of advanced age and inexperienced in business affairs; that she at all times intrusted to said Bigelow the entire management of said trust and the control and handling of the property covered thereby; that in all matters relating to the management of said trust estate the said Bigelow, by and with the consent of the said Chaffee, acted practically as sole trustee."

The court also found that Phillipsborn abandoned the design of using the building for the manufacture and sale of cloaks and dry goods and offered to assign the lease to the plaintiff upon condition that he would perform all the conditions and covenants to be performed by Phillipsborn; that the plaintiff informed Bigelow of his willingness to take an

assignment of the lease provided he might sublet the premises to tenants for stores and offices and obtain the consent of the trustees, through Bigelow, to the assignment and subletting; that Bigelow assented to the assignment and to the proposed subletting provided the guarantors would continue their guaranty in force under such arrangement; and that relying on the consent of Bigelow, for the trustees, to the assignment and subletting the plaintiff expended upwards of $5,000 in changing and altering the building to fit it for renting to subtenants, and thereafter sublet the first floor as stores and the second and third floors as offices, the subtenants occupying under their subleases to Bigelow's knowledge and without objection from him or Miss Chaffee.

The court found that there was no sufficient proof that a written consent had been given by the lessors to the assignment and subletting. It found that the plaintiff paid the rent according to the conditions of the lease and that Bigelow and Chaffee received it while they were trustees knowing that the lease had been assigned to the plaintiff, that the plaintiff had been engaged in subletting, that he had expended large sums of money in fitting the premises for subletting, and that he intended to sublet the premises during the remainder of the term.

The court held that the breaches of the covenant against assignment had been waived, that the covenant against subletting applied to a subletting of the whole of the premises and not to a subletting of less than the whole, and enjoined the bringing of any action for a recovery of the premises based upon a breach of the lease by assignment or subletting.

The trustee and the remaindermen appeal separately from this judgment.

For the appellants there were briefs by *Miller, Mack & Fairchild,* and oral argument by *Geo. P. Miller.* They cited, among other authorities, *New Home S. M. Co. v. Simon,* 113 Wis. 267, 89 N. W. 144; *Wesling v. Kroll,* 78 Wis. 636, 47

N. W. 943; *Winslow v. B. & O. R. Co.* 188 U. S. 646, 23 Sup. Ct. 443; *Voss v. N. W. Nat. L. Ins. Co.* 137 Wis. 492, 118 N. W. 212; *Monroe W. W. Co. v. Monroe,* 110 Wis. 11, 85 N. W. 685; *Swedish Am. Nat. Bank v. Koebernick,* 136 Wis. 473, 117 N. W. 1020; *Castello v. Citizens State Bank,* 140 Wis. 275, 122 N. W. 769; *Kew v. Trainor,* 150 Ill. 150, 37 N. E. 223; *Bruley v. Garvin,* 105 Wis. 625, 81 N. W. 1038; Wood, Landl. & T. (1st ed.) p. 529, sec. 323; 1 Taylor, Landl. & T. (9th ed.) §§ 278, 286, 411; 2 id. § 501; Stats. (1898), sec. 2302.

Frank M. Hoyt, for the respondent, on the question of waiver cited 21 Am. & Eng. Ency. of Law (2d ed.) 587; *Randol v. Tatum,* 98 Cal. 390, 33 Pac. 433; *Detlor v. Holland,* 57 Ohio St. 492, 49 N. E. 690; *Jolly v. Single,* 16 Wis. 280; *O'Keefe v. Kennedy,* 57 Mass. 325; 1 Taylor, Landl. & T. § 410; 2 id. § 495; and on the doctrine of estoppel, *Chynoweth v. Tenney,* 10 Wis. 397; *Racine Co. Bank v. Lathrop,* 12 Wis. 466; *Monroe W. W. Co. v. Monroe,* 110 Wis. 11, 22, 85 N. W. 685; *Swedish Am. Nat. Bank v. Koebernick,* 136 Wis. 473, 117 N. W. 1020.

SIEBECKER, J. The court found that the trustees, Frank G. Bigelow and Julia L. Chaffee, waived the breach of the covenant in the lease against assignment without the written consent of the lessors. It appears that the premises in question were duly assigned to Bigelow and Chaffee as testamentary trustees, pursuant to the will of Edward H. Brodhead, deceased, upon the trust to pay out of the income thereof the expenses of the administration of the trust and to divide the remainder as directed by the will. The court found that they duly qualified and acted as such trustees until July 7, 1905, and that Bigelow had charge of the management of the affairs of the trust. Upon the evidence adduced the court also found that Chaffee, as trustee, intrusted the entire management of

the trust to Bigelow, and that with her consent he acted for her in all matters in managing and administering the affairs of such trust. This fact is assailed by the present trustee, *Mr. Miller,* the appellant, upon the ground that the evidence does not sustain the court's finding on this issue in the case. The evidence of Bigelow is that she authorized him to manage, control, and handle the property and to do whatever was required to discharge the duties of the trustees in this regard. The evidence fails to show that Miss Chaffee took any active part in the management of the property, but it shows that in the control and management of this property Bigelow practically did everything required to be done to discharge the obligations imposed by the trust. It is averred that this does not constitute proof authorizing Bigelow to act for Miss Chaffee as such trustee, because his asserted authority cannot be established by such declarations. We do not regard his statements as irrelevant to the inquiry; they bear on the question of his authority to act for her, and should be considered in connection with the other facts and circumstances of the case. It is undisputed that he as trustee did the negotiating for this lease; that he dealt with the plaintiff concerning the assignment thereof to the plaintiff, and conducted all of the transactions, including the reception of the rents due under the lease, practically as sole trustee, for a period of over a year, and that Miss Chaffee at no time throughout this time appeared to take part in or objected to this method of conducting the business in which she was a co-trustee. Her conduct respecting the matter is persuasive as tending to show that she did intrust the entire management of the trust and the control and handling of the trust property to her co-trustee, Bigelow, and tends to support the evidence of Bigelow that she conferred full authority on him to act for and represent her in all these respects. The acts of Bigelow must be held to have had her approval and assent and to be binding on

them as trustees in the transactions between them and the plaintiff concerning this lease and the occupancy and use of the trust property.

The lease, as stated, contained a covenant against assignment thereof without the written consent of the lessors. The court found that no such consent was obtained when it was assigned to the plaintiff, but held that this breach was waived by the lessors by Bigelow's reception of the rent with full knowledge of such assignment. The facts are without dispute that he knew of and orally assented to the assignment and for one year accepted and collected the rent accruing thereon from the plaintiff. Under the circumstances the acceptance of the rents was a waiver by the lessors of the breach of the covenant against assignment. *Gomber v. Hackett,* 6 Wis. 323; *Jolly v. Single,* 16 Wis. 280; *Palmer v. City L. Co.* 98 Wis. 33, 73 N. W. 559; *O'Keefe v. Kennedy,* 3 Cush. (57 Mass.) 325.

The covenant against subletting was breached, but this also was fully known to the trustees when they accepted under the lease rent which accrued after the breach. Such acceptance is a waiver of such prior breaches. It appears, however, that *Mr. Miller,* as trustee, from the 1st of February, 1909, to the commencement of this action, refused to accept any rent accruing under the lease, and claimed that he had no knowledge of the breach of the covenant and that he had not consented thereto nor to the subletting of the premises by the plaintiff to his various tenants after the payment of the last instalment of rent prior to February 1, 1909, and that he had not waived these breaches of the lease. The waiver of the breach against assignment by the acting trustees, before *Mr. Miller's* appointment, operated to discharge the forfeiture and amounted to an election to continue the lease in force with the plaintiff as lessee of the premises. This became binding on all of the parties thereto, and *Mr. Miller,* who succeeded to the trusteeship, has no cause for declaring the

lease forfeited on account thereof. 1 McAdam, Landl. & T. § 192.

Mr. Miller, however, insists that the underletting of the ground floor in May, 1909, was a breach and justifies a re-entry by the defendants. This claim is based on the ground that the covenant against underletting is continuous, and hence that the former waivers of its breach discharged only these particular breaches, and that he can insist upon the subsequent forfeitures. As stated in the statement of facts, plaintiff submitted his plans for changes in the building, to fit it for use as a store and offices instead of the use specified in the lease, and obtained the assent of Bigelow thereto both before and after his purchase of the lease. It was understood that the proposed changes were to be made for the purpose of enabling the plaintiff to sublet the building in parts as stores and offices, and to that end plaintiff expended upwards of $5,000. He thereafter, to the knowledge of the trustees, devoted the building to such uses, by underletting it from the beginning of the term to February, 1909, when *Miller* for the first time insisted that such underletting avoided the lease. It is clear that the plaintiff was induced to incur this large expenditure for the purpose of underletting the building, as proposed, throughout the term of the lease, and that the acting trustees, who had full control of the premises, fully understood this and assented thereto, and that up to February 1, 1909, with full knowledge thereof, they acquiesced in plaintiff's use of the premises. To permit the lessors to re-enter for underletting would, under these circumstances, operate to do such an injustice to the plaintiff as equity will not tolerate. The facts and circumstances present a case showing that the plaintiff was induced through the acts of the lessors to expend large sums of money and to change his position to his prejudice, by accepting an assignment of the lease and thereby assuming all of its obligations, upon the understanding that he could underlet the premises through-

out the term in the manner he has done. This establishes an estoppel within the rule of the following cases which equity will enforce against the lessors to protect the rights of the plaintiff: *Benavides v. Hunt,* 79 Tex. 383, 391; *Carpenter v. Wilson,* 100 Md. 13, 59 Atl. 186; *Knoepker v. Redel,* 116 Mo. App. 62, 92 S. W. 171; *The "Elevator Case,"* 17 Fed. 200; 1 McAdam, Landl. & T. § 194.

The right to dismiss the appeal upon the ground that *Mr. Miller,* as trustee, on October 31, 1911, gave notice of the termination of the tenancy under the provisions of the lease, thus recognizing it as a subsisting and operating contract and hence leaving nothing to adjudicate in this action, we do not regard as well founded under the stipulation of the parties to the action. The parties evidently intended by this stipulation to preserve to each the right to prosecute the action to a final determination upon the issues presented, and that any act of either party respecting other rights arising under the lease was not to affect the right of prosecuting this action to a final judgment. The motion must therefore be denied.

By the Court.—The judgment appealed from is affirmed.

GROSS COAL COMPANY, Respondent, vs. CITY OF MILWAUKEE, Appellant.

December 8, 1911—January 9, 1912.

Pleading: Sufficiency of complaint: Amendment: Appeal: Review: New trial: Municipal corporations: Streets: Paving: Changing established grade: Presumptions: Official acts.

1. Even if the trial court erroneously overruled an objection to any evidence under the complaint, that fact does not impair the probative quality of the evidence admitted; and an appellate court should not, by disregarding such evidence, deprive the trial court of its power to permit the complaint to be amended.

2. Upon an appeal from an order granting a new trial the court will not review an order overruling a demurrer *ore tenus*.
3. Evidence that abutting property owners paved a street, with the consent of the city council and of the board of public works and under the supervision of said board and of city engineers, is evidence that the pavement was laid to the established grade, even though all of such acts were without authority of law.
4. The granting of a new trial rests largely in the discretion of the trial court.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Dismissed.*

Action to recover for an alleged injury to plaintiff's property on First avenue in the city of *Milwaukee* by reason of a change in the established grade and the erection of a viaduct on said avenue. The appeal is from an order setting aside a verdict in favor of the defendant and granting a new trial.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* special assistant city attorney, and oral argument by *Mr. Williams.*

For the respondent there was a brief by *Lenicheck, Robinson, Fairchild & Boesel,* and oral argument by *F. J. Lenicheck* and *F. T. Boesel.*

TIMLIN, J. A new trial in this case was granted on the ground that the verdict was against the weight of evidence. The verdict was for the defendant and it appealed.

One point made by the defendant is that the complaint did not state a cause of action, and there was an objection at the trial to the reception of any evidence thereunder. This objection, it contends, was erroneously overruled, hence that all the evidence was wrongly received, and for this reason the verdict was not against the weight of evidence, but the circuit court abused its discretion in granting the new trial on that ground because there was not only no weight of evidence but no evidence. This position has a captivating semblance of

logic and deserves scrutiny. But if it be granted that the circuit court erred in overruling this objection to the admission of evidence, still this ruling did not impair the probative quality of the evidence when admitted. Evidence does not lose its probative force because it is not backed by pleading. The pleading is in such case subject to amendment. To correct the alleged error of the circuit court by now wholly disregarding the evidence would deprive that court of the power of amendment. To this power the plaintiff has the right to appeal after it is ascertained by the circuit court or by this court that the ruling of the circuit court admitting the evidence was erroneous. An objection in this form is in the nature of a demurrer to the complaint, and upon appeal from an order granting a new trial this court will not review an order overruling a demurrer. *Flanagan v. C. & N. W. R. Co.* 45 Wis. 98; *Jones v. Milwaukee E. R. & L. Co.* 147 Wis. 427, 133 N. W. 636, and cases cited.

On the question of plaintiff's right to recover as for a change of grade the evidence to show that the street was formerly constructed and paved to the established grade is not wholly lacking. It consists of a showing that after the ordinance of 1888 established the grade a granite block pavement was ordered by the city authorities and this order was rescinded. On November 19, 1888, the board of public works sent a communication to the common council to the effect that, upon the request of property owners (abutters), permission was granted them by the board to do the work with cedar blocks. That the landowners did so and at the same time paved the crossings and gutters, and for the latter ought to be reimbursed by the city. The common council took action on this communication, apparently recognized this arrangement of the board of public works by allowing these claims for reimbursement. The witness Steinman, who was an alderman and an occupying abutter in the street in question at that time, describes this cedar block paving and the

action of the abutters under the supervision of the board of public works, and that there were engineers who, he has reason to believe, were members of the city engineer corps to give the grades and stakes, and that a city inspector was there to oversee the work while it was in progress. We think this was evidence that the paving was done under the supervision of the board of public works and therefore at the proper grade. *State ex rel. Willis v. Prince,* 45 Wis. 610. In the nature of things it is pretty difficult for any person who has not tested the work with instruments to say positively that any paving work is up to the lawfully established grade. This fact must be proven by the best competent evidence available to the plaintiff. It is argued that the city authorities had no lawful power to so authorize the property owners and the latter no lawful right to do the work. The statute authorizing this method seems to have been repealed about six years before.

It is further contended that the city engineers had no lawful right to represent the city in this matter and that the city inspector had nothing to do with the grades. Granting all this, it only goes to defeat any claim of estoppel against the city. It does not disable these acts as evidence tending to show that the pavement was laid to the established grade. These are acts from which, with the uncontroverted fact that the paving was done with the consent of the board of public works and the city council, the jury might infer that the paving was put down upon the lawful grade level. There is evidence to the contrary, consisting mostly of measurements made some years before and some years after the paving in question. But the effect of these measurements as evidence is weakened by other evidence showing that the ground in this vicinity was soft and marshy and the street surface liable to sink.

We cannot say that there was no evidence before the jury which might entitle the plaintiff to recover on this ground.

"The granting of a new trial rests largely in the discretion of the trial court." *Bailey v. McCormick,* 132 Wis. 498, 112 N. W. 457, and cases. On the amount of damages the evidence is based upon opinion and quite evenly balanced, the witnesses for plaintiff estimating a depreciation of about $100 per front foot and those for the defendant testifying that there were no damages, rather a benefit to plaintiff by the construction of the improvement. Because the question is not before us, we express no opinion in regard to the sufficiency of the complaint. Finding no reversible error, the appeal from the order granting a new trial should be dismissed.

By the Court.—Appeal dismissed.

KRUCK, by guardian *ad litem,* Respondent, vs. WILBUR LUMBER COMPANY, Appellant.

December 9, 1911—January 9, 1912.

Master and servant: Injury: Unguarded machinery: Duty of master: Statute construed: Questions for jury: Contributory negligence: Assumption of risk: Special verdict: Actionable negligence: Proximate cause: Damages: Minors: Instructions to jury.

1. A mistake whereby the wrong belt was designated in a question submitted for special verdict was immaterial where there was no doubt which belt was meant and the jury was evidently not misled.
2. Where a rapidly revolving belt was so located as to come within two or three inches of the sleeve of the operator of a machine when he attempted to make adjustments with a wrench, it was a question for the jury whether it was so located that under sec. 1636*j*, Stats. (1898), it was required to be securely guarded.
3. The knives in one of the heads of a "molding sticker" in a planing mill were neither "shafting" nor "gearing" within the meaning of sec. 1636*j*, Stats. (1898), and were not required thereby to be guarded. Whether or not, in this case, such knives were so located that, irrespective of statutory requirements, the master was charged with the duty of guarding them, was a question for the jury.

4. Even though such knives should have been guarded, yet, such guarding not being required by sec. 1636*j*, Stats. (1898), the employer may, in an action for injuries to an employee caused by such knives, defend upon the ground that the plaintiff assumed the risk.
5. Where the trial court refused defendant's request to have a certain issue submitted to the jury, it cannot be deemed to have found such issue in favor of plaintiff, under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), by ordering judgment in his favor.
6. A finding by the jury to the effect that an employer ought to have guarded certain machinery which the statute did not require to be guarded, without any finding upon the controverted issue as to whether the injured employee assumed the risk of its unguarded condition, establishes only nonactionable negligence.
7. A finding by the jury that the proximate cause of plaintiff's injury was both actionable and nonactionable negligence on the part of defendant, will not sustain a judgment for plaintiff—it being essential that there be a specific finding that defendant's actionable negligence was such proximate cause.
8. In a special verdict the question relating to proximate cause should be so framed that any responsive answer will disclose what actionable negligence of defendant was or was not the proximate cause of plaintiff's injury.
9. In an action for injuries to a seventeen-year-old employee in a planing mill, sustained in attempting to adjust the head of a "molding sticker" while it and the pulleys were in motion, upon evidence showing, among other things, that he had been instructed by the foreman to do so and that other employees customarily did it with the parts in motion, the question of contributory negligence was one for the jury.
10. A finding by the jury in such case absolving plaintiff from contributory negligence cannot be considered as a finding that he did not assume the risk from unguarded revolving knives of the machine, especially in view of the instructions given to the jury and of the statute, sec. 1636*j*, Stats. (1898).
11. In an action by a minor for personal injuries, where there was no evidence of emancipation, it was error to instruct the jury that they might allow for diminished earning capacity from the time of the injury, instead of from the time of plaintiff's majority. [Whether such error alone would be ground for reversal, not determined.]

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Reversed.*

This is an action to recover damages for personal injuries

received by the plaintiff August 13, 1909, while working at a machine called a "molding sticker" in defendant's planing mill at Waukesha, resulting in the amputation of four fingers of his left hand. The plaintiff was seventeen years old at the time of the injury and had been employed by defendant continuously for about a year and a half previous thereto; during all of which time, except about two weeks before the injury, he worked near the sticker machines. His duties were to stack and tie into bundles the moldings that were turned out from these machines and send same to the job room, and for about three days prior to the time he was ordered to operate the machine in question he fed strips of lumber into what is called the "big sticker" machine. On the 13th day of August, 1909, the plaintiff was directed by the defendant's foreman to operate a certain sticker machine. The use which such a machine serves is to cut and shape wooden moldings out of strips of lumber that are fed to it by the operator at one end thereof, and the finished product is removed and carried away, after it has passed through the machine, at the other end. A brief and general description of the machine, so far as necessary for the purposes of this case, is as follows: It is an iron frame fastened to the floor, about three and a half feet in height, and is equipped with four heads or tool holders, into which are fitted or fastened various shaped knives to surface different sized moldings. These heads are each separately operated by individual belts, and some of them are shifted and adjusted by the operator, by loosening a bolt or set-screw, to the dimensions required by the different sized moldings. The heads are blocks of iron or steel, about eight inches long and four inches square, into which are set the knives. They are attached to short vertical or horizontal shafts, on the other ends of which are pulleys, on which are the belts running to the power pulley, and that in turn is operated by a large belt revolving around the overhead main shaft. They are located in different places

on the frame, some toward the outer side thereof and some toward the center. The latter are called the inside heads, and revolve on the upper end of a vertical shaft, with the belt and pulley on the lower end. The inside head in question revolved around the shaft at the rate of 3,400 revolutions per minute. After plaintiff had operated this machine a short while he attempted to shift the inside head while it was revolving, by loosening the bolt with a wrench, so as to adjust it for shaping a strip of lumber, when, as he testifies, the belt running the bottom head caught the sleeve of his left arm between the elbow and wrist, threw his hand against the knives, and injured it in the manner already described.

The negligence charged was (1) failure to instruct; (2) failure to properly and safely cover the belts; and (3) failure to guard and inclose the knives.

The jury returned the following special verdict: (1) that the belt which ran the inside head of the molding sticker machine in question was so located as to be dangerous to defendant's employees in the discharge of their duties; (2) that such belt could have been securely guarded or fenced; (3) that the knives in the inside head of the machine in question were so located as to be dangerous to defendant's employees in the discharge of their duties; (4) that the knives in said inside head of the machine in question could have been securely guarded; (5) that defendant's foreman, Russell, on the day of the accident, directed plaintiff to put in the knives and set up the sticker machine in question; (6) that defendant was guilty of a want of ordinary care which was the proximate cause of plaintiff's injury; (7) that plaintiff was not guilty of a want of ordinary care which proximately contributed to his injuries; and (8) damages $5,625.

From a judgment entered upon such verdict the defendant appealed.

For the appellant there was a brief by *Harper & McMynn,* and oral argument by *R. N. McMynn.*

For the respondent there was a brief by *W. B. Rubin,* attorney, and *W. B. Rubin* and *H. B. Walmsley,* of counsel, and oral argument by *Mr. Rubin* and *Mr. Max Schoetz, Jr.*

VINJE, J. The jury found that the belt which ran the *inside* head of the machine plaintiff operated was so located as to be dangerous to employees in the discharge of their duties. The evidence is conclusive and undisputed that the belt which ran the *bottom* head was meant; and it is evident the jury were not misled by the use of the word *inside* instead of the word *bottom.* The testimony was all directed to the one belt, hence the mistake in describing it became immaterial. This belt was so located that when plaintiff attempted to adjust the inside head with the wrench it came within two or three inches of his sleeve, and there is evidence to show that it had a wobbly or up-and-down motion which may have brought it even nearer. A rapidly revolving belt so located with reference to where employees are called upon to discharge their duties certainly presents a jury question as to whether or not it comes within the provisions of sec. 1636*j,* Stats. (1898), and is required to be securely guarded. The finding of the jury that it did, rests upon sufficient evidence to sustain it.

The trial court evidently treated the knives of the head of the machine as coming within the provisions of the statute, if they were so located as to be dangerous to employees in the discharge of their duties. This was error. They are neither shafting nor gearing within the meaning of the statute, and are not required by it to be guarded. *Schmitt v. Seefeld,* 139 Wis. 459, 121 N. W. 136.

Whether or not the knives were so located, irrespective of the statutory requirements, as to charge the master with the duty of guarding them because they were dangerous to employees in the discharge of their duties, was a question for the jury. Since they were not required by the statute to be

guarded, it became a question for the jury, even though they should have been guarded, to find whether or not plaintiff assumed the risk of their unguarded condition. The defendant asked to have the question of the assumption by plaintiff of the risk resulting from the unguarded condition of the knives submitted to the jury, but the court refused the request. It could not, therefore, be deemed to have found such issue in favor of plaintiff under the provisions of sec. 2858*m*, Stats. (Laws of 1907, ch. 346), by ordering judgment in his favor. The result is, we have finding 1 by the jury establishing actionable negligence on the part of the defendant, and finding 3 establishing nonactionable negligence on its part—there being no finding that plaintiff did not assume the risk. The only question relating to proximate cause is the sixth one, which reads: Was defendant guilty of a want of ordinary care which was the proximate cause of plaintiff's injury? The trial court construed the jury's answer to this question as finding the negligence set out in questions 1 and 3 to be the proximate cause of the injury. Such construction, we think, is the only reasonable one that can be given this verdict. If this construction be given it, the jury found actionable negligence and nonactionable negligence on the part of the defendant to be the proximate cause of plaintiff's injury. Such a finding does not sustain a judgment in his behalf. *Peck v. Baraboo,* 141 Wis. 48, 122 N. W. 740. It was suggested by counsel for plaintiff upon oral argument that an additional ground of negligence, namely, a failure to warn plaintiff of the danger of the uncovered knives, was found in the sixth question. We are unable to reach that conclusion. The instructions on the question relate solely to the abstract definition of burden of proof, ordinary care, and proximate cause. They do not even remotely suggest any new or additional ground of negligence, and, as before stated, the trial court did not understand that any additional ground of negligence was found in answer to the question.

Moreover, the evidence would not sustain a finding that defendant was negligent in failing to warn plaintiff of the danger of the revolving uncovered knives. So we have a case where it appears upon the face of the verdict that the proximate cause of the injury is found to be both actionable and nonactionable negligence on the part of the defendant. This lacks an affirmative finding that defendant's *actionable* negligence was the proximate cause of plaintiff's injury—an essential element in every special verdict in a negligence case. We cannot eliminate from proximate causation the nonactionable any more than we can the actionable negligence. All we can say is that the verdict lacks a specific finding that the defendant's *actionable* negligence was the proximate cause of the injury complained of, and that, as stated in *Peck v. Baraboo, supra,* is a fatal defect. Indeed, this verdict does not in terms declare that the negligences found in answer to questions 1 and 3 constitute the proximate cause of the injury to plaintiff. Trial courts in submitting special verdicts should be careful to so frame the question relating to proximate cause that any responsive answer thereto will disclose what actionable negligence on the part of defendant does, or does not, constitute the proximate cause of plaintiff's injury.

It is urged by defendant that plaintiff was guilty of contributory negligence as a matter of law in attempting to adjust the head while it and the belts were in motion. There is evidence that he was instructed by the superintendent or foreman to do so, and that other employees customarily did it with the parts in motion. In view of such evidence and of plaintiff's age and experience, as shown by the testimony, we think the question of his contributory negligence was for the jury, and that their finding upon it should not be disturbed.

The verdict absolving plaintiff from contributory negligence cannot be construed as a finding that he did not assume the risk resulting from the unguarded revolving knives. Especially is this so in view of the fact that the instructions

given under that question related only to the burden of proof and the definition of ordinary care. Not a word was said about the assumption of any risk whatever. The statute (sec. 1636*j*) also clearly distinguishes between contributory negligence and the assumption of risk in cases of this kind by permitting the one to constitute a defense and the other not, where it applies.

Plaintiff was a minor, about eighteen years of age. There was no evidence in the case to show an emancipation, and yet the trial court instructed the jury that they might allow for diminished earning capacity from the time of the injury instead of from the time of his majority. It is true that in the case of *Sharon v. Winnebago F. Mfg. Co.* 141 Wis. 185, 124 N. W. 299, the court held a charge substantially similar not prejudicial error in that case. As there must be a reversal here on other grounds, it is not necessary to decide whether or not the instruction alone constituted ground therefor. Attention, however, is called to the error so that it may not recur if the case be tried again. It appears from defendant's brief, not contradicted by plaintiff, that an action is now pending between the father of the plaintiff and the defendant to recover for loss of his son's services during minority. Manifestly the defendant should not be compelled to pay both the father and the son for the diminished earning capacity of the latter during minority.

By the Court.—Judgment reversed, and cause remanded for a new trial.

PARKES and another, Respondents, vs. CITY OF MILWAUKEE, imp., Appellant.

December 9, 1911—January 9, 1912.

Municipal corporations: Street improvements: Letting work in several contracts: Special assessments: When payable: Premature entry on tax roll: Action to set aside: Equity: Error affecting "groundwork of tax:" Statute construed.

1. The Milwaukee city charter, providing that the board of public works shall enter into "a contract" for the work of improving a street, does not require the entire work to be let in one contract; and where there are two different kinds of work to be done (as macadamizing and cement work), they may be let to different contractors.
2. Where the original assessment of benefits is made in a single sum for the entire work, there is no apportionment of the benefit and the law contemplates that the work should be fully completed before the assessment goes upon the tax roll and payment becomes compulsory.
3. The issuing of an improvement certificate for the cost of the macadamizing in front of a lot, and the placing of the amount thereof upon the tax roll, before completion of the cement sidewalks and gutters, were, however, mere irregularities which do not affect the substantial justice of the tax and are not ground for setting it aside in equity, there being no suggestion that the remaining work is not let to a responsible contractor or will not be completed.
4. In ch. 295, Laws of 1909 (secs. 1210*h*—1 to 1210*h*—4, Stats.),—providing that in any action to set aside any tax "for any error or defect going to the validity of the assessment and affecting the groundwork of such tax" the plaintiff shall pay the amount of the taxes, interest, and charges in dispute as a condition of maintaining the action, etc.,—the words "groundwork of the tax" refer to some serious jurisdictional defect, not mere irregularities in the details of the proceedings after jurisdiction is properly acquired; and accordingly the act does not apply to the case of a mere premature extension of an assessment upon the tax roll.

[5. Whether ch. 295, Laws of 1909, is applicable to special assessments, doubted; whether it is valid, not determined.]

APPEAL from orders of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *One order reversed; the other affirmed.*

This is an action in equity, commenced February 20, 1911, to cancel a special assessment certificate for $341.39, issued by the officers of the defendant city against the plaintiffs' real estate for the macadamizing of a street in front of said real estate. The complaint alleges that the common council determined to macadamize the roadway, construct a cement curb and gutter and a cement sidewalk, and that an assessment was afterwards made against the plaintiffs' property of $375, as benefits for the entire work; that the contract for macadamizing the roadway was let to one firm and the contract for constructing the cement gutter and sidewalk to another firm; that the first named firm did certain macadamizing and grading in front of plaintiffs' property, the amount of which in yards had been certified to by the city engineer, and at the contract price the same amounted to $341.39, for which sum a special assessment certificate had been issued against plaintiffs' property and the same had been placed upon the tax roll of 1910; that the cement curb, gutters, and sidewalks have not been completed and will not be completed before the middle of the year 1911. The plaintiffs' claim is that there can be no valid certificate issued for the macadamizing alone, but that the entire work must be completed before any certificate can be legally issued or carried into the tax roll. A general demurrer to the complaint was overruled. The city also moved to dismiss the complaint, on the ground that ch. 295, Laws of 1909, was applicable to the case, and that the plaintiffs had not paid the assessment within twenty days after the commencement of the action as required by that act. The court denied the motion to dismiss, on the ground that the act named was unconstitutional, and the city appeals from both orders.

For the appellant there was a brief by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* special assistant city attorney, and oral argument by *Mr. Williams.*

For the respondents the cause was submitted on the brief of *Otjen & Otjen.*

WINSLOW, C. J. The language of the complaint must be construed as meaning that the work of macadamizing the roadway had been completed according to the contract, but that the work of building sidewalks and gutters was not completed at the time the certificate in question was issued. This being the case, only two questions arise upon the demurrer: (1) Does the law require that the entire work for which the original assessment of benefits was made be let in one contract? and (2) If two contracts be made, each covering a separate part of the whole work, can a certificate be legally issued to one contractor and the amount thereof placed on the tax roll while the work of the other contractor remains unfinished? As to the first question, while the charter says that the board shall enter into "a contract" for the work, we are not referred to any provision of the city charter which specifically requires the letting of the entire work to one contractor, nor does there seem to be any persuasive reason why it should be so held. On the contrary, the argument seems the other way. Where, as here, there are two different kinds of work to be done, namely, macadamizing and construction of cement work, it may very well be that the city could obtain considerably better terms by contracting directly with a contractor in each special line of work for that part of the work which is in his line. It was directly held in *Wright v. Forrestal,* 65 Wis. 341, 27 N. W. 52, that the charter of *Milwaukee* (the provisions of which at that time were much the same as now) did not direct that such improvements be let by one contract. We have no difficulty in holding that the first question must be answered in the negative.

As to the second question different considerations apply. The original assessment was made by the board of public works in a single sum for the entire work, and represented the amount which in their judgment would be added to the value of the property by the completion of the entire scheme of improvement. They determined that the property would be

improved to the amount of $375 by the completed paving, guttering, and sidewalking. They did not determine that it would be benefited in any part of that sum by the paving alone nor by the sidewalk alone. We think, therefore, that it was contemplated that the entire work should be completed before the assessments went into the tax roll and their payment became compulsory. But these considerations do not necessarily mean that the complaint states a good cause of action in equity.

Under the provisions of the charter no more than $375 could be collected of the plaintiffs in any event, therefore when the sidewalk and gutter were completed the certificate issued to the sidewalk contractor against the plaintiffs' property could not exceed $33.61. If the sidewalk and gutter, therefore, are completed according to the contract, the plaintiffs will simply be required to pay their assessment of $375 for the whole completed work. There is no allegation in the complaint which shows or suggests even the probability that the gutter and sidewalk contract will not be completed in accordance with its terms. It had been let to a contractor whose solvency is not questioned, was in process of completion when the complaint was drawn, and there is no suggestion that there will be any failure in carrying it out.

Under these circumstances the rule that mere irregularities in the proceedings which do not affect the substantial justice of the tax will not be ground for setting it aside must be applied, and when applied renders it plain that the complaint states no cause of action in equity.

As to the motion to dismiss the complaint under the provisions of ch. 295 of the Laws of 1909 (secs. 1210*h*—1 to 1210*h*—4, Stats.), it seems to us very clear that the motion was rightly denied, but not for the right reason. The act provides, in substance, that in any action brought to set aside any tax "for any error or defect going to the validity of the assessment and affecting the groundwork of such tax," the

plaintiff shall within twenty days after the commencement of the action pay to the proper treasurer the amount of the taxes, interest, and charges in dispute as a condition of maintaining said action, and shall be entitled to recover back the excess which he so pays over and above the amount which it is finally adjudged that he should have paid with interest. The act does not apply to this case, because, even conceding that the assessment here was prematurely carried on to the tax roll, it cannot be said that the irregularity affected "the groundwork of the tax." These last named words are quite vague and not easy of accurate definition, but they certainly do not include any such irregularity as is claimed here. They refer to some serious jurisdictional defect, not mere irregularities in the details of the proceedings after jurisdiction is properly acquired. Such being the case, the act has no application here, even if it should be held to cover special assessments, a question concerning which there may be considerable doubt, but which we do not decide. We do not, therefore, reach the question of the constitutionality of the law, and we express no opinion upon it. It seems proper, however, to observe that the trial judge based his conclusion that the law is unconstitutional upon the case of *Philleo v. Hiles,* 42 Wis. 527, and other cases of like character, and that the extreme doctrine of this line of cases has been much modified by the more recent decisions. *Hixon v. Oneida Co.* 82 Wis. 515, 52 N. W. 445.

By the Court.—The order overruling the demurrer is reversed, and the order overruling the motion to dismiss is affirmed, and the action is remanded with directions to sustain the demurrer to the complaint; appellant to recover no costs except clerk's fees of the court.

PARKES, Appellant, vs. LINDENMANN, Respondent.

November 15, 1911—January 30, 1912.

Trial: Setting aside perverse verdict: Appeal: Bill of exceptions: Error not affirmatively shown.

1. A perverse verdict is one rendered in disregard of the law as given to the jury by the court.
2. Where the bill of exceptions does not contain any part of the charge to the jury, this court cannot say that the court below committed error in holding a verdict perverse.

APPEAL from an order of the circuit court for Milwaukee county: J. C. LUDWIG, Circuit Judge. *Affirmed.*

This is an action for personal injuries resulting from a collision with defendant's automobile. The plaintiff on the afternoon of November 21, 1908, went to the southeast corner of National and Sixth avenues in Milwaukee, intending to board an east-bound street car at that corner, and took a position in the street about fifteen feet north of the curb and about two feet south of the south rail of the east-bound track, on which track a car was approaching from the west. While she was standing at this point the defendant drove his automobile up Sixth avenue from the south at the rate of about four miles an hour. He proposed to turn east on National avenue. As he reached the south line of that avenue he was a little west of the center of Sixth avenue, and he made a turn towards the east. He saw the plaintiff standing and looking towards the car, and testifies that he sounded his horn and steered his machine so as to go in front of her; that when he was within ten feet or so of her she started forward four or five feet, so as to bring her within the intended course of the machine, and he then turned his machine to go back of her and she ran back in front of the machine, and before he could stop it she had been knocked down and seriously in-

jured, although she was not run over. The jury returned the following special verdict:

"(1) Was the plaintiff injured by being struck by defendant's automobile at the intersection of National avenue and Sixth avenue, in this city, on November 21, 1908? *A.* (by the court). Yes.

"(2) Was the defendant, when he turned into National avenue from Sixth avenue and up to and at the time of the accident, guilty of any want of ordinary care? *A.* Yes.

"(3) If you answer the second question 'Yes,' state in what respect defendant failed to use ordinary care. *A.* The defendant had sufficient space on either side to pass plaintiff, and thus avoid the accident.

"(4) If you answer the second question 'Yes,' was such want of ordinary care on the part of the defendant the proximate cause of the injury? *A.* Yes.

"(5) Was the plaintiff guilty of a want of ordinary care which proximately contributed to the injury? *A.* No.

"(6) At what sum do you assess plaintiff's damages? *A.* Seven thousand (7,000) dollars."

On motion of defendant the court set aside the verdict and granted a new trial on the ground that the verdict was perverse, and from this order the plaintiff appeals.

For the appellant there was a brief by *Otjen & Otjen,* and oral argument by *Henry Otjen.*

C. Doerfler, attorney, and *Walter H. Bender,* of counsel, for the respondent.

The following opinion was filed December 5, 1911:

WINSLOW, C. J. In this case the defendant's motion to set aside the verdict and for a new trial was based on a number of different grounds, but the record shows that it was granted on one ground only, namely, for the reason that it was perverse.

A perverse verdict is one rendered in disregard of the law as given to the jury by the court. 2 Bouv. Law Dict. (Rawle's Rev.) 663; Black, Law Dict. (2d ed.) 896.

In the present case we are not informed as to what propo-

sitions of law were given to the jury by the court. The bill of exceptions does not contain the charge of the court or any part of it. Not knowing what the instructions given by the court were, it is manifestly impossible for us to say that the trial court was in error when it decided that the jury disregarded its instructions. As error must affirmatively appear before we can reverse the order, it must necessarily be affirmed.

By the Court.—Order affirmed.

A motion for a rehearing was denied January 30, 1912.

NEACY, Appellant, vs. THOMAS and others, Respondents. SAME, Respondent, vs. SAME, Appellants.

November 16, 1911—January 30, 1912.

Appealable orders: Examination of party as adverse witness.

An order requiring a party, upon his examination as an adverse witness under sec. 4096, Stats. (Laws of 1909, ch. 84), to answer certain questions and sustaining his claim of privilege as to others, is not appealable under sec. 3069, Stats. (1898).

APPEALS from orders of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Dismissed.*

For the plaintiff there was a brief by *Quarles, Spence & Quarles,* and *Irving Fish,* of counsel, and oral argument by *W. C. Quarles.*

For the defendants there was a brief by *Adolph Huebschmann* and *Arthur R. Barry,* and oral argument by *Mr. Huebschmann.*

The following opinion was filed December 5, 1911:

WINSLOW, C. J. In an action of libel the defendant *Berger* declined to answer a large number of questions which were asked him in the course of his examination as an ad-

verse witness under sec. 4096, Stats. (Laws of 1909, ch. 84), on the ground that he believed that his answers might tend to incriminate him. The commissioner certified the matter to the circuit court, where an order was entered requiring the witness to answer certain of the questions, and sustaining his claim of privilege as to a large number of the questions. The plaintiff appeals from those parts of the order sustaining the claim of privilege, and the defendants *Berger* and the *Social Democratic Publishing Company* appeal from those parts of the order requiring *Berger* to answer certain questions.

Both appeals must be dismissed under the authority of *Phipps v. Wis. Cent. R. Co.* 130 Wis. 279, 110 N. W. 207. The orders complained of are merely rulings upon evidence, made in the course of the examination. They are not final orders in a special proceeding, nor do they in any proper sense grant, refuse, continue, or modify a provisional remedy. *State v. Wis. T. Co.* 134 Wis. 335, 113 N. W. 944.

By the Court.—Appeals dismissed.

A motion for a rehearing was denied January 30, 1912.

ROSENBERG and others, Respondents, vs. SHEAHAN and others, Appellants.

November 17, 1911—January 30, 1912.

Evidence: Exclusion: Sufficiency of objections: Municipal ordinances: Proof.

1. Where evidence is excluded upon a mere general objection, the ruling will be upheld on appeal if any ground in fact existed for the exclusion. In the absence of any request by the opposing party or by the court to make the objection definite, it will be assumed that it was understood and that the ruling was placed upon the right ground.
2. Where evidence offered is manifestly improper the court may, in its discretion, exclude the same whether objected to or not.

3. Where evidence was not proper under any circumstances a general objection, though overruled, will be deemed to have been sufficient.
4. A printed booklet without authentication and having nothing to indicate that it was an official publication, which was offered to prove the existence of a municipal ordinance, might, if admitted as evidence, have been treated as of no probative force whatever, or might have been excluded even if no objections thereto were made; hence its exclusion under a general objection was not error.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

Action on contract to recover for a hoisting elevator installed for defendants. The plaintiffs' claim was that they furnished an elevator in accordance with their agreement to do so. Defendants answered, admitting that they contracted with plaintiffs for the elevator mentioned, but insisting that the contract was conditioned upon its having a carrying capacity of 2,000 pounds and being installed and put in operation satisfactory to them, which they wholly failed to do; that the elevator only had a carrying capacity of 1,000 pounds; that it was not satisfactorily installed in several respects, specified; and that they seasonably refused to accept it as installed, or at all, unless made to comply with the contract, which was not done.

There was evidence tending to support defendants' theory, also evidence tending to show that plaintiffs furnished a special machine according to agreement, and that, with some small exceptions requiring a small expenditure of money to remedy the matter, plaintiffs fully complied with the contract. The case was first tried in the civil court at Milwaukee, and plaintiff was allowed to recover for substantial performance; $9 being deducted to remedy imperfections.

On appeal to the circuit court the cause was heard on the record and judgment affirmed.

F. H. Gugel, for the appellants.

For the respondents the cause was submitted on the brief of *William Kaumheimer.*

The following opinion was filed December 5, 1911:

MARSHALL, J. A cause having been tried upon the record, and nothing appearing to the contrary, it must be presumed the trial court reached the conclusion complained of from such evidence as was deemed competent. Therefore, the judgment cannot be disturbed on appeal by assuming that evidence was rejected which was shown to have been objected to on the original trial, nor upon the ground that the appellate court should have rejected evidence which was subject thereto upon a particular, but which the court was not bound to reject upon a general, objection. Counsel for appellants insist that some evidence offered upon a material point and objected to generally, was admissible and should have been considered below, and be considered now because not objected to specially, even if on some particular ground it was excludable.

The evidence mentioned appertains to a claim that the elevator was installed under a contract which did not contemplate compliance with a regulation ordinance of the city of Milwaukee. Whether that be so or not, or whether the ordinance, if there be one, had anything to do with the field of respondents' operation under any circumstances, or could cut any figure in this case, we need not decide or even suggest, in view of the conclusion we have reached.

Appellants attempted to prove the existence of the ordinance by means of a booklet of a few pages having nothing about it to indicate that it was an official publication. There was a general objection. The court of original jurisdiction took the evidence, making no ruling. Whether in reaching the original conclusion embodied in the judgment in the initial jurisdiction the evidence in question was considered, does not affirmatively appear. If it should have been rejected,

the presumption must be, as we have seen, that it was. The appellate court excluded the evidence under the general objection.

Counsel cite many cases to show that the court below erred in rejecting the evidence because the objection thereto was not specific. The fact seems to have been overlooked that the cited cases are of trials where there was a general objection, the evidence was received, and it was held proper because of competency for a court to do so, the objection not being specific; and overlooked the companion rule that if, in face of a general objection, only, the court rejects the evidence the ruling will not be reversed on appeal if it appears that the evidence was objectionable upon any specific ground. There, it is to be presumed, the specific infirmity was the deciding factor, and it was competent for the trial court to take efficient notice thereof though it was not bound to do so. *Pettit v. May,* 34 Wis. 666; *Nicolai v. Davis,* 91 Wis. 370, 64 N. W. 1001; *Crawford v. Witherbee,* 77 Wis. 419, 46 N. W. 545; *Evans v. Sprague,* 30 Wis. 303, and many similar cases which might be cited, are all instances where the evidence was received and it was held not error because the objection was general.

True, it is the rule that where evidence is rejected under a general objection and a contrary ruling would have been called for upon a specific objection, and counsel making the offer requests the court to specify the particular ground for the adverse ruling for the purpose of obviating it, it is improper to refuse to do so; *Colburn v. C., St. P., M. & O. R. Co.* 109 Wis. 377, 85 N. W. 354; but that is not this case, and is in harmony with the general rule stated.

This is elementary:

"The rule that the objection should be specific has no application, however, where a general objection is sustained; in that case the party against whom the ruling was made cannot urge that the objection was too general." Jones, Ev.

(2d ed.) § 894 (897); 8 Ency. Pl. & Pr. 229; 1 Wigmore, Ev. § 18.

That rule seems to be thus rather more specifically stated in *Tooley v. Bacon,* 70 N. Y. 34, than in any of our own adjudications which we have in mind:

"When evidence is excluded upon a mere general objection, the ruling will be upheld upon appeal if any ground in fact existed for the exclusion; it will be assumed in the absence of any request by the opposing party or the court, to make the objection more definite, that it was understood, and that the ruling was placed upon the right ground."

There are other exceptions to the general rule that objections should be specific, and, if not, an adverse ruling will not be held error, as where evidence offered is manifestly improper the court may, in its discretion, exclude the same whether objected to or not; *Farmers' & M. Bank v. Whinfield,* 24 Wend. 419; Jones, Ev. (2d ed.) § 893 (896); and, further, where it is manifest that the evidence is not proper in any circumstances, a general objection, though overruled, will be deemed to have been sufficient. 1 Wigmore, Ev. § 18.

The foregoing in favor of respondents, disposes of the contention based on the claimed existence of a city ordinance affecting their right to recover; but there were good reasons for the exclusion. As the trial court held, the offered evidence was not a copy of a city ordinance authenticated in the manner provided by sec. 4137, Stats. (1898). The document did not purport to have been printed by authority of the common council, as the statute provides. That was sufficient to justify the exclusion. *Quint v. Merrill,* 105 Wis. 406, 81 N. W. 664. It was not a case of defective authentication with which the trial court had to deal, but of no authentication at all. The name of the chief inspector of buildings was printed at the foot of the fly leaf, but not in a way to indicate that even he authorized or was in any way a party to the publication. As well might the print have been offered had

it been contained in the "Milwaukee News" or other Milwaukee paper as ordinary filling. Had it been regarded as evidence, it might have been treated as of no probative force whatever. Had no objection been made, it might have been disregarded just the same. So the case must now be treated as if there were nothing in the way of respondents maintaining their recovery, if the contract for the elevator was of the character and was performed in the manner claimed by them, save and except the little departure which the trial court held was not sufficient to warrant disturbing the original decision that there was substantial performance.

On the remaining question suggested by the last foregoing little need be said. Two trials have been had. The matter at issue was one of fact. The result at first, confirmed on appeal to the circuit court, could not be disturbed without first concluding there was no substantial basis for it in the evidence. An examination of the record,—even the trend of the argument of counsel for appellants in respect to the matter,—satisfies us there is no such want of support for the judgment complained of. Therefore it must be affirmed.

By the Court.—So ordered.

A motion for a rehearing was denied January 30, 1912.

BROWN, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

November 17, 1911—January 30, 1912.

Negligence: Question for jury: Street railways: Injury to traveler on street: Contributory negligence: Special verdict: Form of questions: Instructions to jury: Evidence: Weight: Positive and negative testimony: Appeal: Harmless errors.

1. Where the evidence tends to prove negligence, but contradictory inferences may also logically be drawn therefrom, the question of negligence is for the jury.
2. Evidence showing, among other things, that on a dark rainy night plaintiff, who was familiar with the street and the operation of electric cars thereon, drove in a buggy for a considerable distance on the track upon which the cars would necessarily come up behind him; that there was room for him to travel on the street outside of the tracks; that the car by which he was injured made considerable noise as it approached; and that, although it was too dark to see the tracks, he had shortly before the accident turned out to let another car pass,—is *held* to sustain a finding by the jury of contributory negligence.
3. A question in a special verdict, "Did any want of ordinary care on the part of the plaintiff proximately contribute to the *damages* which he has sustained?" was faulty and improper, the proper inquiry being whether such want of care proximately contributed to his *injury*.
4. In an action for injuries to a traveler whose buggy was struck at night by an electric car coming from behind, instructions to the effect that it was the duty of the motorman in the exercise of ordinary care to keep a proper lookout to avoid collision with persons and vehicles upon the streets; that the street car at the time of the accident was entitled to precedence in the use of the portion of the street upon which the tracks were constructed; that the motorman had the right to assume the ordinary traveler would yield to the passage of the car; and that he was entitled to indulge in such presumption until the contrary became apparent to a person exercising ordinary care in the same or similar circumstances,—were correct in the abstract; and although the court might, if requested, have been required to add exceptions or modifications recognized by law, yet in the absence of any such request the failure to do so was not error.

5. Although in such a case it would have been better to treat the negligence of the defendant and that of the plaintiff separately in the instructions, yet it cannot be held that the jury were misled or that there was error prejudicial to the plaintiff because, in the charge upon the question of contributory negligence, the trial court referred to the general rules as to the relative rights and duties of the motorman and a traveler upon the highway, which had previously been given upon the question of defendant's negligence.
6. Neither the testimony of a traveler whose buggy was struck by an electric car that, at and before the time of the collision, he was listening for the gong of an approaching car and did not hear it, nor the testimony of one who was in the street waiting for the car to go by so that he could go on with the matter he had in hand that he heard no other noise than the vibration of the car in motion, was merely negative testimony, though negative in form; and it was error to give to the jury, with reference to such testimony and the testimony of the motorman that he did sound the gong, the rule as to the comparative weight of positive and negative testimony.
7. The error in giving such rule was not, however, prejudicial to the plaintiff in this case, the jury having found him guilty of contributory negligence in a particular not affected by the failure to sound the gong and such finding not having been influenced by the erroneous charge.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Houghton, Neelen & Houghton,* and oral argument by *F. W. Houghton.* As to the relative rights and duties of a motorman and a traveler on the street, they cited *Currie v. Consolidated R. Co.* 81 Conn. 383, 71 Atl. 356; *Lauson v. Fond du Lac,* 141 Wis. 57, 123 N. W. 629; *Cawley v. La Crosse City R. Co.* 106 Wis. 239, 82 N. W. 197; 2 Joyce, Electric Law, § 592; *Consolidated T. Co. v. Haight,* 59 N. J. Law, 577, 37 Atl. 135; *White v. Worcester C. St. R. Co.* 167 Mass. 43, 44 N. E. 1052; *Galbraith v. West End St. R. Co.* 165 Mass. 572, 43 N. E. 501. And to the point that the court erred in its charge as to positive and negative testimony, *Anderson v. Horlick's M. M. Co.* 137 Wis. 569, 119 N. W. 342; *Urbanek v. C., M. & St. P. R.*

Co. 47 Wis. 59, 1 N. W. 464; *Berg v. C., M. & St. P. R. Co.* 50 Wis. 419, 7 N. W. 347; *Ralph v. Chicago & N. W. R. Co.* 32 Wis. 177; *Joannes v. Millerd,* 90 Wis. 68, 62 N. W. 916; *Wickham v. C. & N. W. R. Co.* 95 Wis. 23, 69 N. W. 982; *Sutton v. C., St. P., M. & O. R. Co.* 98 Wis. 157, 73 N. W. 993; *Alft v. Clintonville,* 126 Wis. 334, 105 N. W. 561; *Selensky v. C. G. W. R. Co.* 120 Iowa, 113, 94 N. W. 272; *Stanley v. C. R. & M. C. R. Co.* 119 Iowa, 526, 93 N. W. 489; *Rockford, R. I. & St. L. R. Co. v. Hillmer,* 72 Ill. 235; *Annaker v. C., R. I. & P. R. Co.* 81 Iowa, 267, 47 N. W. 68; *Rainey v. N. Y. C. & H. R. R. Co.* 68 Hun, 495; *Mo. Pac. R. Co. v. Johnson,* 44 Kan. 660, 24 Pac. 1116; *McCormick v. K. C., Ft. S. & M. R. Co.* 50 Mo. App. 109; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Cotton v. W. & S. F. R. Co.* 99 Minn. 366, 109 N. W. 835; *McLean v. Erie R. Co.* 69 N. J. Law, 57, 54 Atl. 238; *Haun v. R. G. W. R. Co.* 22 Utah, 346, 62 Pac. 908; *Gibson v. B. & L. E. R. Co.* 226 Pa. St. 198, 75 Atl. 194, 27 L. R. A. N. S. 689; *Morgan v. Iowa Cent. R. Co.* 151 Iowa, 211, 130 N. W. 1058.

For the respondent there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke,* and oral argument by *Clarke M. Rosecrantz.*

The following opinion was filed December 5, 1911:

TIMLIN, J. In this action for negligent injury the jury found the defendant negligent and also made the following findings:

(3) A person in the exercise of ordinary care, driving a buggy under circumstances similar to those in this case, would have discovered the approach of the car in time to have avoided the collision if he had made diligent use of his senses of sight and hearing.

(4) Ordinary care did not require the plaintiff to look to the rear with such frequency that, considering such obstructions to his vision as he may have known to exist and assuming that the car was operated in the usual manner, he should

have discovered its approach in time to have avoided the accident.

(11) In the exercise of ordinary care the plaintiff should have been driving his horse and buggy at the west side of defendant's tracks at the time of the collision.

(12) If the plaintiff had been so driving the collision would have been avoided.

(13) Want of ordinary care on the part of the plaintiff proximately contributed to the damages which he has sustained.

It is contended that the answers to these questions are not supported by the evidence, should have been set aside, and a judgment for $6,500, the amount found by the jury, should have been rendered for the plaintiff. Where the evidence tends to prove negligence, but contradictory inferences may also logically be drawn therefrom, the question of negligence is for the jury. There was evidence that the plaintiff was familiar with the road and the operation of cars thereon; that the night was dark and rainy; that there was a wagon track and room for him to travel on the street out of the reach of passing cars and alongside of the railway tracks. There were two railway tracks in the street, and he going south drove on the west track, that used by cars going south, which would necessarily come up behind him; also that he continued on this railway track for several hundred feet and that the approaching car made considerable noise. The night was so dark that he could not see where the tracks were, but he had shortly before the accident turned out to let another car pass him. This presented sufficient evidence upon which the jury might base a finding of contributory negligence on the part of the plaintiff.

The thirteenth question submitted is faulty and cannot be approved. The proper question is whether the plaintiff's want of care proximately contributed to the injury, not to the damages. But the third, eleventh, and twelfth findings above mentioned cover the question of contributory negli-

gence, even without any aid from the thirteenth finding. Under such showing we cannot undertake to reverse the rulings of the court refusing to change the answers of the jury to the questions finding the plaintiff guilty of contributory negligence, and hence the motion for judgment in favor of the plaintiff was properly denied.

Various errors are assigned in submitting certain questions of the special verdict to the jury, in refusing to submit others, in admitting and excluding evidence, and in refusing and giving instructions to the jury, all of which have been considered, but only the following need be discussed:

The court instructed the jury that it was the duty of the motorman, in the exercise of ordinary care, to keep a proper lookout as to the tracks and streets upon which he is operating the car so as to avoid collision with persons and vehicles upon the street; that the street car at the time of the accident was entitled to precedence in the use of the portion of the street upon which its tracks were constructed, and the motorman had the right to assume the ordinary traveler upon the highway would yield to the passage of the car; that he was entitled to indulge in such presumption until the contrary became apparent to a person exercising ordinary care under the same or similar circumstances. Instructing the jury relative to the thirteenth finding, the court added: "Now, gentlemen of the jury, not to be misled on that, you will have in mind what I have heretofore said to you with reference to the relative duties of the parties, the relative rights or relative duties of the parties, upon this public highway. Always have that in mind when considering these questions that bear upon this proposition." The jury, after deliberating several hours, returned to the court room and requested the reading of that part of the charge with reference to the right the motorman had to assume that his track was clear, and the portions of the charge above referred to were read.

The appellant contends that the instructions were erroneous

under the rule of *Lauson v. Fond du Lac,* 141 Wis. 57, 123 N. W. 629, and that there should have been added a statement to the effect that the speed with which any vehicle can be driven over a highway at night must be determined partly in view of the distance ahead at which travelers upon or approaching the same highway would become visible. The instructions given here were correct in the abstract, and there was no request for their modification by adding the particulars mentioned in *Lauson v. Fond du Lac, supra,* if indeed such instruction was applicable to the instant case. The jury found the defendant negligent and that is all the plaintiff claimed. By finding the plaintiff guilty of contributory negligence they necessarily found that, notwithstanding the negligence of the defendant in the particulars disclosed by the evidence, the plaintiff's negligence was also a contributing cause of the injury. It would have been better to treat the negligence of the defendant and that of the plaintiff separately in the instructions, but we cannot say that the jury were misled or that prejudicial error resulted from the reference by the court in his instructions relative to the thirteenth finding to the more abstract propositions of law concerning the relative duties of the parties on the highway. Upon proper request the court might have been required to add exceptions or modifications recognized by law for these same general rules, but in the absence of such request error cannot be predicated upon the failure of the trial court to do so. The court also instructed the jury as follows:

"There is a question here with reference to the sounding of the gong which you might reach in the course of your deliberations; evidence was given upon both sides upon that subject. You are instructed that the positive testimony of a single witness who testifies that the bell rang on the occasion in question is entitled to more weight than that of two witnesses equally credible who testify negatively that they did not hear it ring. Of course you must bear in mind, in applying this rule, that much depends upon the circumstances,

such as the opportunity of the witnesses for knowing, and the attention which they gave, and which it appears from the evidence they probably gave under all the circumstances shown. The mere fact that one witness testifies contrary to another does not discredit either. The credibility of all witnesses, as I said before, and the weight to be given to the testimony of each, is wholly for your consideration and determination. Positive testimony of a small number of witnesses that they saw or heard a given thing occur, will outweigh the negative testimony of a greater number of witnesses that they did not see or hear it, provided the witnesses are equally credible; but in connection with this instruction should be considered the relative means or opportunity of the several witnesses to see or hear the occurrence, and that it should be carefully kept in mind that it only applies where the witnesses are equally credible. That is, the rule only applies under these circumstances."

This part of the charge was quite erroneous. The motorman testified that he did sound the gong, and the plaintiff testified that he was listening for the gong of an approaching car at and before the time he was struck by the car and didn't hear it. Within the rule attempted to be given to the jury by the court there was no merely negative testimony in this. The rule referred to has a limited application. Within this limited scope it is accurate and valuable, but it can be very misleading if applied where the alleged negative testimony is merely negative in form. *Anderson v. Horlick's M. M. Co.* 137 Wis. 569, 119 N. W. 342; *Urbanek v. C., M. & St. P. R. Co.* 47 Wis. 59, 1 N. W. 464; *Alft v. Clintonville,* 126 Wis. 334, 105 N. W. 561. Even the testimony of the witness Woolgar is not purely negative within the rule in question. He testified that his hearing was good; that there were no noises or disturbances to interfere with his hearing; that on former occasions, from substantially the same position, he heard the gong sound at different points within a distance of about five blocks; that on the occasion in question he heard the sound of the approaching car prior to the collision.

His mental attitude was not that of a listener, but he was in the street waiting for the car to go by so that he could go on with the matter he had in hand, and had heard no other noise except the vibration of the car in motion. His testimony could not be classed as negative within the rule referred to by the learned circuit court. For an illustration of clearly negative testimony within this rule see *Jordan v. Osborne,* 147 Wis. 623, 133 N. W. 32. But this error, we think, was not prejudicial. The defendant was found negligent. Therefore it was not prejudicial to the plaintiff on that score. The plaintiff was found guilty of contributory negligence in a particular not affected by the failure to sound the gong. Therefore the verdict was not affected by the misdirection on that score. Even if the jury had found that there was a failure to sound the gong and that the defendant was also negligent in that particular, this could not prevail to entitle the plaintiff to judgment as long as the finding, supported by evidence, remains to the effect that in the exercise of ordinary care the plaintiff should have been driving his horse and buggy at the west side of defendant's tracks at the time of the collision, and that if the plaintiff had been so driving the collision would have been avoided. We cannot think this finding was influenced by the erroneous charge relative to negative and positive testimony concerning the sounding of the gong.

The evidence presented a case for the jury, and, the jury having found as indicated, that finding must control. We must apply the same rule in support of this verdict as we have in many cases in support of a finding acquitting the plaintiff of contributory negligence or finding the defendant guilty of negligence. Weighed in the same scales we can find no ground for disturbing this finding either for want of evidence or for misdirection which affected the fatal finding.

By the Court.—Judgment affirmed.

A motion for a rehearing was denied January 30, 1912.

NOETZEL, by guardian *ad litem*, Appellant, vs. A. GEORGE SCHULZ COMPANY, Respondent.

December 6, 1911—January 30, 1912.

Master and servant: Injury to operator of machine: Negligence: Assumption of risk: Nonsuit.

In an action for injuries sustained by an employee in falling against the machine at which he was working in defendant's factory, a nonsuit was properly granted, it not being shown that the machine was one which the statute required to be fenced or guarded or that any defect therein caused the injury, and it appearing that plaintiff had been properly instructed but that he unnecessarily placed himself in a dangerous and very awkward position in attempting to stop the machine by shutting off the power and applying the foot brake simultaneously; that his fall was caused by such attempt coupled with the slippery condition of the floor; and that he had assumed the risk arising from such condition.

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

The appeal is from a judgment of nonsuit in an action by an employee against employer for negligent injury to the person.

For the appellant there was a brief signed by *Rubin & Lehr*, attorneys, and *W. B. Rubin*, of counsel, and oral argument by *W. B. Rubin* and *H. B. Walmsley*.

For the respondent there was a brief by *Doe & Ballhorn*, and oral argument by *J. B. Doe*.

TIMLIN, J. The plaintiff was working at a machine for cutting cardboard for paper boxes. The machine was five feet wide and four feet high and provided on one side with a drive-wheel and a fly-wheel. In front there was a movable jaw which opened and closed in operation considerably narrower than the width of the machine, and the top of which

when closed was nearly at the top of the machine. Above this, on the frame of the machine, were two handholds; back of these and on each side was a cogged wheel of twelve or fourteen inches diameter. Some distance above the top of the machine was a switch to shut off the electric power. Near that side of the machine carrying the fly-wheel was a brake consisting of a long piece of wood lying parallel with and nearly upon the plane of the floor, with a shoe on the further end which projected under the fly-wheel and against its rim; and at the front end, which extended toward and a little beyond the front of the machine, it was a straight lever about two by four inches. Between the shoe and the front end of this lever, and near the shoe, was a fulcrum to which this lever was fastened, and the brake was applied by pressing on the front end of the lever with the foot, thus bringing the shoe up against the rim of the fly-wheel. In front, where the operator stood, the floor was covered with tin, and this tin and the brake lever were slippery from oil. There is testimony tending to show that the brake shoe was slippery and did not exercise much friction against the rim of the fly-wheel because of oil or grease having got in there. The brake was not effective to stop the machine at once, but the latter would make several movements of the jaw after the power was shut off and the brake applied. The plaintiff before his injury notified the foreman that the brake was not in good condition and the foreman promised to fix it within a day or two, whereupon the plaintiff continued to work. While so engaged in working, the plaintiff, who was five feet eight inches in height, attempted, without using the handholds, to close the switch near the center of, above, and some distance back from the front of the machine, and to apply the brake by foot pressure on the front end of the lever at the same time. To do this he must have his foot on the brake lever at one side of the machine, his body leaning forward over the moving

jaw, and one hand on the electric switch over the top of the machine. In performing this acrobatic feat he slipped and fell against the machine and was injured. He says:

"I was supposed to stop the machine, and I put my hand on the switch and my foot on the brake; my left foot on the brake. I slipped off with my left foot. My weight went on, my right foot gave out, I fell toward the right, and by falling I fell on the cog-wheel."

In rescuing himself from the cog-wheel he got his fingers into the jaw.

The case was apparently tried without any definite or clear theory of defendant's liability. Mr. Wilke was the superintendent. The plaintiff further testified: "Well, I stood there, and Mr. Wilke told that fellow to show me how to run the machine. The foreman told him to instruct me and he did so." The details of this instruction are not given, nor is it shown by the plaintiff to have been informal or insufficient. There was no proof of any defect in the machine, except that the front end of the brake lever was worn from foot pressure. The plaintiff was standing upon this slippery floor and using this brake day after day, the condition was obvious, and the alleged defect in the brake lever could not have caused his injury. The upper side of this brake lever was not to exceed four inches above the level of the floor, and, assuming that it was footworn at this place, the evidence shows that the wear was slight and that this was not the cause of his fall. The proper way to apply a friction brake is to first shut off the power and then apply the brake. The plaintiff attempted to do these things simultaneously, thus placing himself in a dangerous and very awkward position on the slippery floor. This attempt, coupled with the condition of the floor, caused him to fall. His request for repairs had no relation to the slippery condition of the floor or the slippery condition of the front end of the brake lever. It related to the worn condition and ineffective action of the brake. This worn condition is

not shown to have been so serious as to constitute a defect in the machine. He says with reference to the front end of the brake lever: "I knew very well that I was likely to slip from it at any time. . . . So that really falling against the machine was caused by the slipping of my right foot." The left foot was the one applied to the brake.

The foregoing evidence was given by the plaintiff himself, and entitled the defendant to a nonsuit on the ground that no defect in the machine which caused the injury was shown, and that it was not shown to be one which the statute required to be fenced or guarded; that the plaintiff had been instructed; that he assumed the risk arising from the slippery floor; and that in fact his injury was caused by his attempt to perform the feat of throwing off the switch and stepping on the brake lever simultaneously, situated as they were at such distance apart.

By the Court.—Judgment affirmed.

In re Court Room and Offices of the Fifth Branch of the Circuit Court, Milwaukee County, Wisconsin.

December 8, 1911—January 30, 1912.

Circuit courts: Court rooms, etc.: Duty of county board to provide: Discretion: Unsuitable quarters: Power of court to protect itself: Practice: Ex parte *proceedings: Injunctional order: Appealable order.*

1. In a county like Milwaukee county, quarters which the county board proposes to furnish for the circuit court are neither suitable nor convenient unless they include a jury room.
2. Independent of the statutory duty of the county board to provide suitable and convenient quarters for the circuit court, there is a duty to do so under the constitution, and the discretion of the county board in respect to the selection of court rooms is not wholly beyond the control of the courts.

3. A constitutional court of general jurisdiction, like the circuit court, has inherent power to protect itself against any action that would unreasonably curtail its powers or materially impair its efficiency.
4. In order to preserve the full and free exercise of its judicial functions a circuit court may, in an appropriate case, make an *ex parte* order without formally instituting an action to secure the desired relief.
5. Thus, where a county board threatens to remove a circuit court to unsuitable and inadequate quarters, the court may, in an *ex parte* proceeding, issue an injunctional order restraining such action by the board.
6. The better practice in such a case would be to institute the proceeding by an order to show cause, together with a temporary restraining order. SIEBECKER, KERWIN, and TIMLIN, JJ., dissent.
7. It is within the power of the court, however, to issue an injunctional order absolute in form in the first instance; but in such a case the county board has the right to be heard as to the law and the facts upon a motion to vacate or modify such order.
8. Upon refusal of the circuit court to vacate such an order an appeal therefrom may be taken, it being a final order affecting a substantial right, made in a special proceeding.

APPEAL from an order of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

On April 27, 1911, his honor, Judge TURNER, judge of the Second judicial circuit, Fifth branch, Milwaukee county, Wisconsin, made the following order:

"Whereas on the 25th day of March, A. D. 1908, the *County of Milwaukee,* by its *Board of Supervisors,* entered into a contract of lease with the trustees of Wisconsin Commandery No. 1, Knights Templar, of the city of Milwaukee, whereby it leased from the said trustees 'all the rooms or apartments and the appurtenances thereunto belonging on the fourth floor of the Masonic Building situated on the southeast corner of Jefferson and Oneida streets in the city of Milwaukee' (across the street from the park on which the court house is situated) for the term of three years from the 1st day of May, 1908, the rent reserved being $2,400 a year, to be paid in equal monthly instalments during the term; it was further therein provided, 'it is mutually agreed and under-

stood that said premises shall, during said term, be used only for the purpose of holding court proceedings and when not so used shall be under the control of the parties of the first part;' that the said *County of Milwaukee* did thereupon take possession of the said fourth floor of said building and arranged the same for court room, jury room, judge's chambers, and reporter's room, together with necessary toilet; that said county, at great expense, furnished the said court room and other rooms mentioned, and duly assigned the same to the Fifth branch of said court for use, and the Fifth branch of said court has since that date and is at the present time using and occupying the same for conducting court proceedings and for the use of said judge of said court, and that they have been at all times and now are suitable and proper for such use; that there is no suitable and convenient room for holding said court and for the accommodation of the court and its officers in the court house in said county; that said lease is about to expire. That on the 9th day of February, 1911, the judge of said court received a letter from the trustees of said Commandery, which letter is as follows:

"'Wisconsin Commandery No. 1.

"'Milwaukee, Wis., Feb. 9, 1911.

"'*Hon. W. J. Turner,*

"'Masonic Bldg., City.

"'DEAR SIR: As you are doubtless aware, the lease of the *County of Milwaukee* for the court room in the Masonic Building, occupied by you, expires May 1st. At the same time the leases of most of the other tenants in the building expire, and the trustees are now arranging for renewals of the same.

"'We should be pleased to know at a very early date whether it is the desire of the county to renew its lease.

"'We beg to advise you that the trustees are willing to renew the same for five years at the same rental, and on the same terms and conditions as heretofore.

"'Will you have the kindness to have the matter acted on by the proper parties as early as possible, and oblige,

"'Yours very truly,

"'GEO. A. DAVIES,

"'Q. A. MATTHEWS,

"'ANDREW D. AGNEW,

"'Trustees.'

"That thereupon the judge of said court took the opinion in writing of many of the firms and members of the bar of the said county, irrespective of political affiliations, and they united in a request that the court be continued at its present quarters, stating reasons therefor, which request was presented to the *Board of Supervisors* of said county by the said judge, and accompanied a letter dated February 25, 1911, of which the following is a copy:

" '2/25/1911.

" '*To the Chairman and Board of Supervisors of the County of Milwaukee.*

" 'GENTLEMEN: The term of the lease of my court room and chambers will expire in May following.

" 'The trustees of Wisconsin Commandery have requested that they be informed at an early date whether the county will retain the rooms. I requested from them a proposition in writing and am inclosing the same to you.

" 'You will note that they will renew the lease for a period of five years on the same terms as the present lease. I have also taken the opinion of many of the members of the bar who are actively engaged in the practice of the law before the circuit court, and inclose their request that the court be continued in its present quarters, with reasons therefor.

" 'I wish to add that in my opinion the present location is the most convenient that can be obtained outside of the court house. The reasons are very apparent to those of you who have had business in my court. The proximity to the court house and the clerk's office makes a great saving in expense in transacting the business of the court. I am constantly drawing from the jurors of the courts in the court house and they draw from me. Thus we save in dispensing with the services of a full panel of thirty-six men.

" 'The judges are about to dispense with all over eighty jurors for four courts. This will be done by drawing that number of jurors for all the courts, using jurors and keeping them together in one court room, and my court room is conveniently located and well adapted for that purpose. We will thus effect a saving to the county of at least $120 per day of actual jury service.

" 'The risk of taking files from the court house is great, and being near makes that risk less. Almost daily we have to

use some of the records from the other officers, such as county judge, register of deeds, etc., and again there is a risk and trouble to take them from the court house. Of course, the nearer my court is to the court house, so much is the risk less. The expense and convenience to parties, witnesses, and litigants need not be dwelt upon. It is apparent. My present court room is fully furnished and equipped. All this was done at considerable expense, and in all probability it would not fit another room and it would have to be remodeled, which again means expense. The location is as good as can be found. It is light and well ventilated and removed from the noise as much as possible in a city.

" 'It has been suggested that my court room could be conveniently established in the Pereles Building, in the west room on the fifth floor. I have examined the quarters and they are not suitable or convenient. My furniture would not fit in and leave proper space. The room is too narrow, and with the partition out would leave no room suitable for my private offices. There is no room for the reporter and jury. The noise, when windows are open, would seriously interfere with the transaction of business.

" 'Other reasons might be given why the place is not suited for the holding of a circuit court, but it is unnecessary to state them, as a casual examination will satisfy any one to that effect.

" 'I respectfully suggest to your honorable body that the matter of leasing the present quarters for my court be taken up by you and arrangements to that end consummated upon suitable terms.

" 'Very respectfully yours,

" 'W. J. TURNER, Judge.'

"That all the facts stated in said letter are true within the knowledge of the judge of said court.

"That on the 5th day of April, 1911, the judge of said court received the following letter from the Committee on Public Buildings of said county:

" 'Milwaukee, April 5, 1911.

"'*Hon. W. J. Turner, Judge Circuit Branch 5, City.*

" 'DEAR SIR: The undersigned Committee on Public Buildings and Grounds of the *County Board* have determined that space in the Pereles Building be used and occupied for the

Circuit Court Branch 5, commencing May 1, 1911. The lease for the present quarter of said court will not be renewed.

" 'The committee will be pleased to meet you and receive your suggestions as to decorations and arrangements.

" 'Respectfully,

" 'ALBERT E. GUMZ,

" 'EMIL RUHNKE,

" 'Committee.'

"That just prior to the receipt of said letter it came to the knowledge of the judge of said court that the *Board of Supervisors* of said county wished to establish said court in a room upon the fifth floor of the Pereles Building in said city, located at the corner of East Water and Oneida streets, four blocks from the court house; that the judge of said court personally inspected said quarters proposed to be appropriated for such purpose and ascertained that they were entirely inadequate, and not suitable or convenient for the purposes of the said court, and the judge and officers thereof, and that the business of said court could not be properly administered therein, and that due administration of justice would be hindered and prevented to a large extent by the establishment of such court at said place. That he caused measurements to be taken of the room designated as a court room; that it was but thirty-eight feet long and twenty-six feet wide, and that the furniture and equipment of said court could not be installed in said room and leave proper, suitable, and convenient space for the transaction of the business of the court; that there were not suitable and convenient offices of the court; that there was no jury room and no room for the reporter of said court; that it was proposed to remove a certain partition which would make the court room fifty-six feet long, but the removal of which would entirely deprive the court of any chambers, and there would be neither chambers, jury room, nor reporter's room for its use; that the room itself would, when the windows were raised, be so noisy that it would be with the greatest difficulty that witnesses, attorneys, and the court could be heard in the transaction of business; that the furniture, which cost a great deal of money and was constructed with the idea of being used in a new court house, would have to be cut down and practically destroyed; that there is not sufficient ventilation and there cannot be any in-

stalled in said apartments; that under the plan which is now being carried out by the judges of said court, jurors are selected from one common panel of about eighty names, and have to assemble in the court room of one of the judges and be by him assigned to the various courts; that the assigning of jurors as above described will be taken by the various judges of said court in rotation; that there would be no room for the jurors to assemble even in the enlarged court room proposed; all of which matters have been by the court fully explained to the Committee on Public Buildings of said *County Board.*

"That upon receipt of the letter of April 5, 1911, from the said Committee on Public Buildings the judge of said court wrote a letter to the chairman and acting member of said committee, of which the following is a copy:

" 'Milwaukee, Wis., April 7, 1911.

" '*Mr. Albert E. Gumz and Mr. Emil Ruhnke,*

" 'Committee on Public Buildings, County Board, Milwaukee, Wis.

" 'GENTLEMEN: Am in receipt of yours of the 5th inst., saying that the *County Board* had determined that space in the Pereles Building be used for the room and offices of the court presided over by me. You have evidently ignored the reasons why I cannot accept the quarters in the Pereles Building, as stated in my letter of February 25th to the chairman of the *Board.* You have also ignored the statements I made to your committee when present at its meeting. You have also ignored the request of the bar that my court be retained in its present location. I call your attention particularly to the paragraph in my letter as follows:

" 'It has been suggested that my court could be conveniently established in the Pereles Building, in the west room on the fifth floor. I have examined the quarters and they are not suitable or convenient. My furniture would not fit in and leave proper space. The room is too narrow, and with the partition out would leave no room suitable for my private offices. There is no room for the reporter or jury. The noise, when the windows are open, would seriously interfere with the transaction of business.'

" 'The law is very plain that the county is to furnish a suitable and convenient room and offices for the circuit court.

The law is also very plain that the court cannot be forced into an unsuitable or inconvenient place. I do not wish to be obliged to conflict with the *County Board* in this matter, but if, regardless of the convenience of litigants, attorneys, jurors, the court, and its officers, the *Board* is determined to undertake to carry out the plan, I shall, as my duty compels, make the necessary order that the place you propose is not suitable or convenient, and will establish my court at some other place.

" 'I wish to notify you now of my intention so that you will go to no expense upon the rooms with the expectation that I will accept them for the Fifth branch of the circuit court of Milwaukee county. I explained fully to you that the matter of rent saved was but a trifling sum as compared to the expense of transacting business in the location you suggest. You will remember in my previous letter I called your attention to the saving of more than one hundred dollars daily by reason of the new method adopted by the circuit judges for administering jury work. I have verified my statement to you by having actual measurements made of the space required, and find that I was correct in my previous statement that the rooms are positively inadequate for circuit court purposes.

" 'Yours truly,

" 'W. J. TURNER, Judge.'

"That the facts therein stated are true and correct.

"That after the receipt of such letter the said committee met the judge of said court and proposed to furnish suitable quarters in the court house for such court, to which the judge of said court acceded. Upon investigation by said committee it reported that it could not make such quarters in the court house, and on the 25th day of April, 1911, the following letter was received by the judge of said court:

" 'Milwaukee, Wis., April 25, 1911.

" '*Hon. W. J. Turner, City.*

" 'DEAR SIR: After canvassing the whole subject and considering all possible ways by which space for a court room for your branch of the circuit court might be given room in the court house, the Committee on Public Buildings and Grounds of the *County Board of Supervisors* have found it impractical to locate your court in the court house and have this day decided to locate you in the Pereles Building, in the quarters for which the *County Board* already has a lease and which it is holding under expense to the county treasury.

"'The new court room will be in readiness for you in time for you to remove thereto before the lease of the Masonic Temple quarters expires. You will please consider this action as final in the premises.

"'We will ask you to aid us by having the furniture of your court ready for removal without delay.

"'Very respectfully,

"'ALBERT E. GUMZ.

"'EMIL RUHNKE.'

"That the members of said committee signing said letter have been fully informed by the judge of said court of the insufficiency of the said quarters proposed in said Pereles Building, and notwithstanding their full knowledge of said facts seem to persist in their undertaking to compel the establishment of said court at said place.

"And whereas, it is the duty of the court to maintain and carry on the Fifth branch of said court in suitable and convenient rooms, and the said court can be accommodated for the present in its present quarters, at the same rental, namely, $2,400 per year, which is a reasonable rental, that the said county has been paying therefor, and the said court being of the opinion that the place where it is at present located is suitable and convenient for the purpose of conducting a circuit court, and that the said proposed quarters in said Pereles Building are not suitable, proper, or convenient for conducting said court or the administration of justice:

"Now, therefore, it is ordered and determined that the place in the Pereles Building to which the said *County Board* proposes to have the said court removed is not suitable or convenient for the purposes of conducting a circuit court, and that the due administration of justice in said circuit court cannot be carried on in said quarters for the reasons hereinbefore stated, and the said court does now here order and determine that its furniture and fixtures, both in the court room and in the offices of the judge of said court, the jury room, and the reporter's room be not removed to the said Pereles Building, and the said Albert E. Gumz and Emil Ruhnke and the *Board of Supervisors* of said county and all other persons, officers, and corporations are hereby enjoined and restrained from interfering with the court's possession of said court room, judge's room, reporter's room, and jury room, and with the court's conducting its business in said rooms, and are en-

joined and restrained from in any manner interfering with or disturbing the furniture or furnishings, library, bookcases, or other property used in or in connection with the said court room, judge's chambers, reporter's room, and jury room.

"And it is further, ordered that until the further order of the court the Fifth branch of the circuit court be and the same hereby is established on the fourth floor of the Masonic Building, corner of Oneida and Jefferson streets, where the same is now held, and that the said Fifth branch of the circuit court, until the further order of said court, will be held at the present court room in said Masonic Building, Milwaukee, Wisconsin.

"Of this order let the persons above named, the sheriff of *Milwaukee County,* Wisconsin, the clerk of said court, the county clerk, and the county treasurer take due notice.

"Dated Milwaukee, Wisconsin, April 27, 1911.

"By the Court: W. J. TURNER,

"Judge of the Second Judicial Circuit, Branch 5, Milwaukee County, Wisconsin."

On June 30th the *County of Milwaukee* and its *Board of Supervisors* appeared specially for the purpose of objecting to the jurisdiction of the court both as to subject matter and parties, and moved that the proceedings had on April 27, 1911, and the order entered thereon, be vacated: first, because at the time of the making and entry of said order there was neither an action nor a special proceeding pending regarding said matter, and the court did not have at the time of the entry of said injunctional order jurisdiction of either the subject matter or of the parties affected thereby; second, because "the matter concerning which said proceedings were had and taken and order entered was as provided by law entirely within the power and under the jurisdiction and control of the *Board of Supervisors of Milwaukee County;*" third, because said order was and is without legal authority and is entirely void. The court denied the motion and refused to vacate or set aside the order of April 27th, and from the order denying such motion the *County of Milwaukee* and its *Board of Supervisors* appeal

Winfred C. Zabel, district attorney, and *William I. Tibbs,* assistant district attorney, for the appellants, cited, among other cases, *Board of Comm'rs v. Thompson,* 7 Ind. 265; *Board of Comm'rs v. Gwin,* 136 Ind. 562, 36 N. E. 237; *Waldo v. Manitowoc Co.* 54 Wis. 71, 11 N. W. 252; *Harley v. Lindemann,* 129 Wis. 514, 109 N. W. 570; *Cleary v. Eddy Co.* 2 N. Dak. 397, 51 N. W. 586.

For the respondent there was a brief by *Guy D. Goff* and *S. J. McMahon,* and oral argument by *Mr. Goff.*

BARNES, J. This is the first time in the history of this court that a controversy between a circuit judge and a county board over quarters for a court has reached this tribunal, and the few precedents that have been cited would indicate that such regrettable disputes were infrequent elsewhere.

We have a general finding or conclusion by the circuit judge that the quarters which the *County Board* proposed to furnish for his court were neither suitable nor convenient. We have also a recital of the specific facts upon which the circuit judge based such conclusions. There can be no doubt that the specific facts found sustain the general conclusion reached. A single one of them would be all-sufficient to do so. We refer to the finding that there was no jury room in the new quarters which the *Board* proposed to provide. A large part of the time of circuit courts is taken up with the trial of jury cases. As soon as one case is submitted another is called, and the business of the court is being dispatched while the jury which has retired is deliberating. Such deliberations may consume but a short time or they may last a couple of days. If no jury room is provided, the court room must be placed at the disposal of the jury and the business of the court must be entirely suspended while each jury is endeavoring to reach a verdict. We shall indulge in no argument to show that, in a county like *Milwaukee,* circuit court quarters which have no jury room for use while jury cases are being tried are neither

suitable, adequate, nor convenient. The proposition is self-evident.

Judge TURNER in his letter to the chairman of the *County Board,* under date of February 25, 1911, stated that the quarters which the *Board* proposed to furnish were inadequate and stated why they were so. In his letter of April 7th to the Committee on Public Buildings he did likewise. Replies were sent to each of these letters by said committee, but not a single statement of fact in either of Judge TURNER's letters was controverted, nor was the slightest reference made to the conclusions drawn from such facts. On the motion to dissolve the injunction the *County Board* might have taken issue with the circuit judge on any or all of the recitals of fact made or conclusions drawn therefrom by that official, but it did not do so. By reason of the failure to deny the correctness of the facts recited, the recitals must stand as the truth and as being practically admitted for the purposes of this appeal. The *County Board* evidently stood and still stands on the proposition that the duty of providing a court room was by law vested in the *Board* and was one in reference to which the circuit judge had nothing whatever to say.

The *County Board* was wrong in reaching this conclusion. Circuit courts are provided for and their jurisdiction is defined by the constitution. Secs. 2 and 7, art. VII, Const. This jurisdiction is somewhat amplified by secs. 2420 and 2654, Stats. (1898), as well as by other statutory provisions. By sec. 2424, Stats. (1898), Judge TURNER was obliged to hold four terms of court each year, at each of which a jury was required to be summoned unless otherwise ordered by the court. By sec. 656, Stats. (1898), it is provided that "when the court house shall from any cause become unsafe, inconvenient *or unfit for holding court,* the county board shall appoint some other *convenient* building at the county seat for that purpose temporarily." The law creating the court over which Judge TURNER presides (Laws of 1907, ch. 645, sec. 4) provided that "The *Board of Supervisors of Milwaukee*

County shall provide *court rooms and suitable offices* wherein said judge may discharge his duties." It was thus made the statutory duty of the *County Board* to provide suitable and convenient quarters for the accommodation of the court. There was a duty to do so under the constitution, independent of and regardless of any statute, and it is not correct to say that there is a discretion vested in the *County Board* in reference to the selection of court rooms which is entirely beyond the control of the courts. If such were the case, it would be within the power of county boards to at least greatly curtail the usefulness of circuit courts by declining to furnish them quarters in which judicial business could be transacted. The authorities, in so far as any can be found on the subject, are to the effect that a constitutional court of general jurisdiction has inherent power to protect itself against any action that would unreasonably curtail its powers or materially impair its efficiency. A county board has no power to even attempt to impede the functions of such a court, and no such power could be conferred upon it. Circuit courts have the incidental power necessary to preserve the full and free exercise of their judicial functions, and to that end may, in appropriate cases, make *ex parte* orders without formally instituting an action to secure the desired relief. The following cases sustain what has been said, and no cases holding a contrary doctrine have been called to our attention: *Supervisors v. Wingfield,* 27 Gratt. 329; *New Orleans v. Bell,* 14 La. Ann. 214; *Belvin v. Richmond,* 85 Va. 574, 8 S. E. 378, 1 L. R. A. 807; *Ex parte Mayor, etc. of Birmingham,* 134 Ala. 609, 33 South. 13; *Board of Comm'rs v. Stout,* 136 Ind. 53, 35 N. E. 683, 22 L. R. A. 398; *Board of Comm'rs v. Gwin,* 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402; *Dahnke v. People,* 168 Ill. 102, 48 N. E. 137; *State ex rel. Kitzmeyer v. Davis,* 26 Nev. 373, 68 Pac. 689; *Mayhew v. Comm'rs,* 1 Disn. 186; *In re Lyman,* 55 Fed. 29; *Comm'rs v. Hall,* 7 Watts, 290; *In re Janitor,* 35 Wis. 410; *In re Waugh,* 32 Wash. 50, 72 Pac. 710.

It being apparent from the record now before this court that the quarters which the *County Board* proposed to furnish were inadequate and that the circuit judge was within his rights in refusing to occupy them, the only remaining question which it is necessary to consider relates to the proper practice to pursue when such a disagreement arises. Disputes of this character apparently have been few, and the practice to be followed is not very well settled. In some of the cases above cited it is likened to a contempt proceeding which the judge has a right to dispose of in a summary manner. The order here made, although absolute in form, was not so in fact. The appellant had the right to move to set it aside and to have it vacated if erroneous for any reason, and might make any proper showing of fact or law at its command on the hearing of that motion, and was entitled to have the same considered and disposed of in a fair and impartial manner. So the order in practical effect amounted to nothing more than an order to show cause, coupled with a temporary restraining order operative until a hearing was had. This being so, all appearance of autocratic action by the circuit judge would have been avoided had an order to show cause, with a temporary restraining order, been issued in the first instance, and we think it would have been the better practice to have instituted the proceeding in that way. But the difference between the two methods of procedure is one of form rather than of substance, and the circuit judge had jurisdiction to proceed in either way. Judge TURNER acted within his right in deciding primarily that the quarters which the *County Board* proposed to furnish were inadequate. But the law vests in the county board the power to furnish court rooms, and, so long as those furnished are reasonably adequate, courts cannot insist that different quarters be provided, although they may be more commodious or pleasant or even more convenient. A circuit judge cannot deprive a county board of the right to be heard on the sufficiency of the court rooms which it proposes to place at the

disposal of the circuit court, and we do not understand that Judge TURNER claims or asserts any such right. The order appealed from is a final order affecting a substantial right made in a special proceeding, and is therefore appealable.

By the Court.—Order affirmed.

The following opinion was filed February 2, 1912:

SIEBECKER, J. (*concurring*). I concur in the affirmance of the order appealed from, but do not concur in the suggestion made in the opinion that the practice adopted by the circuit court in making the initial order without notice and hearing is not the best practice for exercising the inherent power of the court to prevent interference with its proceedings and the conduct of its administrative affairs.

The suggestion that the initial step should be taken upon notice for a hearing on the question presented would in my judgment deprive a court of power to efficiently protect itself against infractions upon the orderly conduct of its business and of capacity to perform its functions as an agency of the state. If such a notice and adversary hearing is made compulsory, it is obvious that courts could thereby be prevented from using needful summary remedies which the varying exigencies of occasions imperatively demand. When such occasions arise, the courts by exercising their inherent powers must be able to employ a procedure of such a character that they can effectually and expeditiously protect themselves and thus be able to execute their governmental functions. I consider that the right of any interested and aggrieved party to apply to the court for a modification or vacation of any such initial order on a showing that no grounds existed for making it furnishes such a party an appropriate and adequate remedy.

I am authorized to state that Justices KERWIN and TIMLIN concur in the view herein expressed.

WATER POWER CASES.

STATE EX REL. WAUSAU STREET RAILROAD COMPANY vs. BANCROFT, Attorney General, and others.

STATE EX REL. JACKSON MILLING COMPANY vs. SAME.

STATE EX REL. NEKOOSA-EDWARDS PAPER COMPANY vs. SAME.

STATE EX REL. KOENIG and another vs. SAME.

STATE EX REL. SOUTHERN WISCONSIN POWER COMPANY vs. SAME.

STATE EX REL. CHIPPEWA VALLEY RAILWAY, LIGHT & POWER COMPANY and another vs. SAME.

December 12, 1911—January 30, 1912.

Equity: Injunction: Confiscation or destruction of property: Invalid statute: Public wrong: Supreme court: Original jurisdiction: Navigable rivers: Authorized dams: Control: Sovereignty of state: Ownership of water powers: Charters: Reserved power of repeal: Eminent domain: Taking of private property: Just compensation: Due process of law: Riparian rights: Regulation: Legislative power: Declaring property a nuisance, or use a public use: Judicial questions: Statutes: Partial invalidity.

1. An averment that property in the possession of complainant is threatened with destruction or confiscation by unwarranted statutory declaration that it is a public nuisance and by the imposition of penalties for the use of such property, sets forth a private wrong calling for the interposition of equity *quia timet* against ministerial officers charged with the execution of the statute.
2. Where it is averred that all improvements to navigation constructed under former statutes and existing in the navigable rivers of the state are still recognized as such improvements by a new statute, but also by the latter declared to be public nuisances and threatened with abatement and destruction, and their maintenance, use, and up-keep penalized except upon conditions plausibly charged to be invalid and unenforceable, a threatened public wrong affecting the sovereign prerogatives of the state and calling for prevention by injunction is sufficiently averred.

3. In the case last cited the supreme court will exercise its original jurisdiction.
4. A statute declaring that all energy, developed or undeveloped, of the navigable waters of the state is subject to the control of the state for the public good, that the beneficial use and natural energy of the navigable waters of the state for all public uses are held by the state in trust for all the people, should be sustained as an assertion of the sovereignty of the state and the power of regulation instead of an assertion of proprietorship, especially when such construction is essential to uphold the statute.
5. The reserved power of repeal of charters contained in the constitution or in a charter must be construed so as to harmonize it with other commands and restrictions contained in the constitution, and it does not authorize the taking without compensation of the physical property acquired under said charter. This reserved power of repeal is also subject and subordinate to the provisions of the federal constitution which forbid the state to deprive any person of life, liberty, or property without due process of law and to the substantial equivalent of the latter contained in the state constitution.
6. Where a charter reserving therein no right of repeal is granted to a natural person, authorizing the construction of a dam in a navigable river in aid of navigation and accepted by such grantee by construction of the required dam, the charter is not repealable at the pleasure of the legislature; but before acceptance it is so repealable. When such charter is granted to a natural person, reserving to the state a right of repeal, or where it is granted to a corporation, and in either case accepted by construction of the required improvement, while there exists the power of repeal this does not include confiscation or destruction of any property which can exist notwithstanding the repeal, but all such property is protected by the usual constitutional guaranties applicable to other property.
7. Sec. 1596, Stats. (Laws of 1911, ch. 652), is prospective only in its operation and, so far as it refers to streams not theretofore within the purview of the statute it purports to amend, it affects only dams, etc., placed in such streams after the act of 1911 went into effect.
8. The right to use the water of a navigable river for the creation or development of power upon his own land is a riparian right appurtenant to the riparian land and belongs to the owner of such land. The *quasi*-private ownership of the bed of a navigable river and all incorporeal riparian rights are subject and subordinate to the public right of navigation, but not so the

ownership of the bank. Where the ownership of the bank is necessary for the construction of a dam in aid of navigation the state is powerless to construct or authorize the construction of such dam without the consent of the riparian owner or expropriation with compensation to such owner, and the riparian owner is powerless to obtrude a dam into such navigable waters without the consent of the state. Where by joint consent of the riparian owner and of the state the riparian owner constructs such dam at his expense in aid of navigation, the consideration moving to the state is the improvement of the navigation and to the riparian owner is the creation or development of the water power. This water power and the right of the riparian owner thereunto does not in such case conflict with the public right of navigation, but is rather promotive of such right, and it continues to be a riparian right as before and the private property of the riparian owner subject to regulation by the state to a degree commensurate with its character and situation. It is in no sense the property of the state. Whether one person or another owns this resulting water power is not material to the interests of navigation.

9. An act of the legislature which forbids any person to conduct or maintain or operate or use any dam or other improvements in or across any navigable stream without a franchise; which defines the word "franchise" to be one obtained under the act; which defines the word "improvements" as used in the act to include much valuable property including the riparian land; which declares such dam and "improvements" a public nuisance subject to abatement as such and penalizes the use and maintenance of such property,—constitutes, as regards owners of formerly authorized dams, a taking of the property, if in order to obtain a franchise under the act in question the owner of the property is obliged to consent to the surrender of valuable property rights belonging to him.

10. The legislature cannot conclusively declare property existing at the time the statute goes into effect a public nuisance and penalize the use and enjoyment thereof.

11. The legislature has no power to conclusively declare that a given use of property is a public use.

12. The matters covered by the two preceding paragraphs present judicial questions, for otherwise the legislature could confiscate property without making compensation.

13. The act in question by declaring the property a public nuisance, providing for its abatement, and penalizing its use conditionally; and without any physical change in the property or its condition recognizing it as a lawful structure in aid of naviga-

tion, and allowing it to remain on condition that some other person apply for it or that the owner relinquish valuable property rights without compensation and make certain payments to the state, operates to deprive such owner of his property without due process of law, unless just compensation to such owner is provided.

14. The just compensation required by the constitution is not provided by permitting compensation only if some one at some indefinite time after the taking shall appear and want the property in question.

15. The just compensation required by the constitution is not provided by a statute limiting the compensation to be awarded so as to exclude all increase in value of the property after a given date long prior to the taking.

16. Neither is such compensation provided where a riparian owner, having no dam or charter for a dam, is for a taking of the bank not allowed the full value of his riparian rights, including the use of water for power purposes and the advantage which the land presents for creating a water power by construction of a dam; nor is such compensation provided where a riparian owner who has lawfully constructed a dam and owns the resulting water power, but whose charter to maintain the dam is repealed, is not allowed to recover the value of his water power thus improved and in that condition.

17. To declare property a public nuisance, provide for its abatement, and penalize its use without making compensation, but at the same time permitting the owner to obviate these consequences by applying for and obtaining a franchise under which he must consent that his hitherto private property be impressed with a public use, that after a stated interval some other person may take the property for a private use, that the state or a municipality may take it for a public use, and that in the latter case he forego part of the compensation required by the constitution and pay a franchise fee to the state, is depriving such owner of his property without due process of law contrary to the federal constitution, and is invalid legislation under the state constitution as well.

18. Private property taken by one who has the right to use so much thereof as may be reasonably necessary for his own purpose or purposes is taken for a private use.

19. In order for part of an act to be upheld as separable it is essential that such part found to be within the constitutional power of the legislature forms, independently of the invalid portions, a complete law in some reasonable aspect so that it may fairly be concluded that the legislature would have enacted the same

without the invalid portion. Where a legislative enactment has an all-pervading purpose coupled with minor details and administrative features and this purpose is unconstitutional, such minor details and administrative features cannot survive condemnation of the main purpose.

[Syllabus by TIMLIN, J.]

A SERIES of suits, as above indicated, involving the validity of ch. 652, Laws of 1911, was brought in this court against *Levi H. Bancroft,* Attorney General, *James A. Frear,* Secretary of State, *Andrew H. Dahl,* State Treasurer, and the *Railroad Commission,* consisting of *John H. Roemer, Halford Erickson,* and *David Harlowe.* When leave to bring these suits was granted, the question of the jurisdiction of this court to entertain the suits was expressly reserved.

On behalf of the relators there were briefs signed by *B. R. Goggins,* attorney for *Wausau Street Railroad Company, Jackson Milling Company, Nekoosa-Edwards Paper Company,* and *R. P.* and *Geo. Koenig,* by *Burr W. Jones,* attorney for *Southern Wisconsin Power Company,* by *Bundy & Wilcox,* attorneys for *Chippewa Valley Railway, Light & Power Company* and *Northwestern Steel & Iron Works,* and by *Moses Hooper, Neal Brown, D. Buchanan, Geo. P. Hambrecht,* and *B. L. Parker,* of counsel; a brief on the question of jurisdiction by *B. R. Goggins,* attorney for plaintiffs, and *Moses Hooper, Neal Brown, D. Buchanan, Geo. P. Hambrecht, Burr W. Jones,* and *B. L. Parker,* of counsel; a supplemental brief by *Bundy & Wilcox,* attorneys for *Chippewa Valley Railway, Light & Power Company* and *Northwestern Steel & Iron Works,* and *Wm. Ruger,* of counsel; a supplemental brief by *Jones & Schubring,* attorneys for *Southern Wisconsin Power Company;* a brief by *Tyler & Young* and *Sanborn & Blake* as *amici curiæ;* a brief by *Rome G. Brown* as *amicus curiæ;* and a brief on behalf of the city of Eau Claire by *Arthur H. Shoemaker,* corporation counsel. The cause was argued orally on this side by *B. R. Goggins, Burr*

W. Jones, Wm. Ruger, C. T. Bundy, Neal Brown, Geo. P. Hambrecht, B. L. Parker, and *Moses Hooper.*

For the relators there were cited, among other authorities, the following: Resolution of Congress of October 10, 1780; Act of Congress of September 12, 1783; Resolution of March 1, 1784; Acts of April 20, 1836, August 6, 1848, and May 13, 1848; Acts and Resolutions of Virginia Legislature of Jan. 2, 1781, October 20, 1783, and March 1, 1784; Ordinance of 1787, art. 4; Act establishing the Territory of Wisconsin, secs. 6, 9, 12; Const. sec. 2, art. II, and sec. 13, art. XIV; Ratification by Virginia, December 30, 1788, of the Ordinance of 1787; *Huber v. Markel,* 117 Wis. 355, 94 N. W. 354; *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 5 Sup. Ct. 441; *Wurts v. Hoagland,* 114 U. S. 606, 5 Sup. Ct. 1086; Laws of 1849, ch. 212, sec. 8; R. S. 1858, ch. 28, sec. 24; R. S. 1878, secs. 135, 195, 1052; Laws of 1901, ch. 95; Laws of 1909, ch. 374; Laws of 1907, ch. 335; Laws of 1911, chs. 591 and 640 (proposed constitutional amendment of 1911); Laws of 1911, pp. 1152–53; Laws of 1853, ch. 72; *Spensley v. Valentine,* 34 Wis. 154; *Smith v. Ford,* 48 Wis. 115, 2 N. W. 134, 4 N. W. 462; *Jones v. Soulard,* 65 U. S. 41; *Propeller Genesee Chief v. Fitzhugh,* 53 U. S. 443; *Jones v. Pettibone,* 2 Wis. 308; *Walker v. Shepardson,* 4 Wis. 486; *Mariner v. Schulte,* 13 Wis. 692; *Arnold v. Elmore,* 16 Wis. 509; *Wis. River Imp. Co. v. Lyons,* 30 Wis. 61; *Olson v. Merrill,* 42 Wis. 203, 211; *Green Bay & M. C. Co. v. Kaukauna W. P. Co.* 70 Wis. 635, 35 N. W. 529, 36 N. W. 828; *Koenig v. Watertown,* 104 Wis. 409, 80 N. W. 728; *Kimberly & C. Co. v. Hewitt,* 79 Wis. 334, 48 N. W. 373; *West v. Fox River P. Co.* 82 Wis. 647, 52 N. W. 803; *Fox River F. & P. Co. v. Kelley,* 70 Wis. 267, 35 N. W. 744; *Kaukauna W. P. Co. v. Green Bay & M. C. Co.* 75 Wis. 385, 44 N. W. 638; *A. C. Conn Co. v. Little Suamico L. Mfg. Co.* 74 Wis. 652, 43 N. W. 660; *Wis. River Imp. Co. v. Pier,*

137 Wis. 325, 118 N. W. 857; *Blanchard v. Doering,* 21 Wis. 477; *Samuels v. Blanchard,* 25 Wis. 329; *Clark v. Plummer,* 31 Wis. 442; *Lawson v. Mowry,* 52 Wis. 219, 9 N. W. 280; *Clark v. Stewart,* 56 Wis. 154, 14 N. W. 54; *Valley P. & P. Co. v. West,* 58 Wis. 599, 17 N. W. 554; *Mack v. Bensley,* 74 Wis. 112, 42 N. W. 215; *Pioneer W. P. Co. v. Chandos,* 78 Wis. 526, 47 N. W. 661; *Janesville C. Mills v. Ford,* 82 Wis. 416, 52 N. W. 764; *Jackson M. Co. v. Chandos,* 82 Wis. 437, 52 N. W. 759; *Falls Mfg. Co. v. Oconto River Imp. Co.* 87 Wis. 134, 58 N. W. 257; *Green Bay & M. C. Co. v. Kaukauna W. P. Co.* 90 Wis. 370, 61 N. W. 1121, 63 N. W. 1019; *Appleton P. & P. Co. v. Kimberly & C. Co.* 100 Wis. 195, 75 N. W. 889; *Consolidated W. P. Co. v. Nash,* 109 Wis. 490, 85 N. W. 485; *Green Bay & M. C. Co. v. Telulah P. Co.* 140 Wis. 417, 122 N. W. 1062; *Holyoke W. P. Co. v. Conn. River Co.* 20 Fed. 71; *Kaukauna W. P. Co. v. Green Bay & M. C. Co.* 142 U. S. 254, 12 Sup. Ct. 173; *U. S. v. Great Falls Mfg. Co.* 112 U. S. 645, 5 Sup. Ct. 306; *Great Falls Mfg. Co. v. Att'y Gen.* 124 U. S. 581, 8 Sup. Ct. 631; *U. S. v. Rio Grande D. & I. Co.* 174 U. S. 690, 19 Sup. Ct. 770; *State ex rel. N. P. R. Co. v. Railroad Comm.* 140 Wis. 145, 121 N. W. 919; *Close v. Glenwood Cemetery,* 107 U. S. 466, 2 Sup. Ct. 267; *New York & N. E. R. Co. v. Bristol,* 151 U. S. 556, 14 Sup. Ct. 437; *Holyoke Co. v. Lyman,* 15 Wall. 500, 522; *Madison, W. & M. P. Co. v. Reynolds,* 3 Wis. 287; *Huber v. Martin,* 127 Wis. 412, 105 N. W. 1031, 1135; *Little Chute v. Van Camp,* 136 Wis. 526, 117 N. W. 1012; *Att'y Gen. v. Railway Cos.* 35 Wis. 425; *Att'y Gen. v. Eau Claire,* 37 Wis. 400; *State ex rel. Att'y Gen. v. Cunningham,* 81 Wis. 440, 51 N. W. 724; *State ex rel. Att'y Gen. v. Frost,* 113 Wis. 623, 88 N. W. 912, 89 N. W. 915; *State ex rel. Lamb v. Cunningham,* 83 Wis. 90, 53 N. W. 35; *In re Court of Honor,* 109 Wis. 625, 85 N. W. 497; *State ex rel. Anderson v. Timme,* 70 Wis. 627, 36 N. W. 325; *State ex rel. Bell v. Harshaw,* 76 Wis. 230, 45 N. W.

398; *State ex rel. Rosenhein v. Frear,* 138 Wis. 173, 119 N. W. 894; *State ex rel. Cook v. Houser,* 122 Wis. 534, 100 N. W. 964; *Wis. W. Co. v. Winans,* 85 Wis. 26, 54 N. W. 1003; *Charnley v. Shawano W. P. & R. Imp. Co.* 109 Wis. 563, 85 N. W. 507; *Rossmiller v. State,* 114 Wis. 169, 89 N. W. 839; *Eastern Wis. R. & L. Co. v. Hackett,* 135 Wis. 464, 115 N. W. 376, 1136, 1139; *W. U. Tel. Co. v. Pennsylvania R. Co.* 195 U. S. 540, 25 Sup. Ct. 133; *Interstate Comm. Comm. v. C. G. W. R. Co.* 209 U. S. 108, 28 Sup. Ct. 493; *Norcross v. Griffiths,* 65 Wis. 599, 27 N. W. 606; *Gratz v. Land & R. I. Co.* 82 Fed. 381; *Janesville v. Carpenter,* 77 Wis. 288, 46 N. W. 128; *Willow River Club v. Wade,* 100 Wis. 86, 76 N. W. 273; *Kelley v. Salvas,* 146 Wis. 543, 131 N. W. 436; *Papworth v. Milwaukee,* 64 Wis. 389, 25 N. W. 431; *Kansas N. G. Co. v. Haskell,* 172 Fed. 545; *Yates v. Milwaukee,* 10 Wall. 497; *Stevens Point B. Co. v. Reilly,* 44 Wis. 295; *In re Southern Wis. P. Co.* 140 Wis. 245, 122 N. W. 801; *Sellers v. Union L. Co.* 39 Wis. 525; *Wis. River Imp. Co. v. Manson,* 43 Wis. 255; *State ex rel. Zillmer v. Kreutzberg,* 114 Wis. 530, 90 N. W. 1098; *State v. Redmon,* 134 Wis. 89, 114 N. W. 837; *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885; *Dartmouth College v. Woodward,* 4 Wheat. 518; *State ex rel. Board of Ed. v. Haben,* 22 Wis. 660; *Mills v. Charleton,* 29 Wis. 400; *Wahlschlager v. Liberty,* 23 Wis. 362; *Railroad Co. v. Ellerman,* 105 U. S. 166; Act of Congress of July 26, 1866, ch. 26 (2 U. S. Comp. Stats. 1901, p. 1437); *Boquillas L. & C. Co. v. Curtis,* 213 U. S. 339, 29 Sup. Ct. 493; *U. S. v. Chandler-Dunbar W. P. Co.* 209 U. S. 447, 28 Sup. Ct. 579; *St. Anthony Falls W. P. Co. v. St. Paul W. Comm'rs,* 168 U. S. 349, 18 Sup. Ct. 157; *Packer v. Bird,* 137 U. S. 661, 11 Sup. Ct. 210; *Fallbrook I. Dist. v. Bradley,* 164 U. S. 112, 17 Sup. Ct. 56; *Hardin v. Jordan,* 140 U. S. 371, 11 Sup. Ct. 808, 838; *Broder v. Water Co.* 101 U. S. 274; *Grand Rapids & I. R. Co. v. Butler,* 159 U. S. 87, 15 Sup. Ct. 991; *Franzini v. Layland,* 120 Wis. 72,

97 N. W. 499; *Rundle v. Delaware & R. C. Co.* 14 How. 80; *Ill. Cent. R. Co. v. Illinois,* 146 U. S. 387, 13 Sup. Ct. 110; *Union B. Co. v. U. S.* 204 U. S. 364, 27 Sup. Ct. 367; *Chicago, B. & Q. R. Co. v. People ex rel. D. Comm'rs,* 200 U. S. 561, 26 Sup. Ct. 341.

On the part of the defendants there was a brief signed by the *Attorney General* and *Russell Jackson,* deputy attorney general, and by *George Lines, Theodore Kronshage, Jr.,* and *Walter D. Corrigan,* of counsel; also a brief by *Paul Husting* as *amicus curiæ;* and the cause was argued orally by *Mr. Jackson, Mr. Lines, Mr. Corrigan,* and *Mr. Husting.* They cited, among other authorities, the following: *Chicago, M. & St. P. R. Co. v. State,* 53 Wis. 509, 10 N. W. 560; *Fitts v. McGhee,* 172 U. S. 516, 19 Sup. Ct. 269; *Ex parte Ayers,* 123 U. S. 443, 8 Sup. Ct. 164; *Morenci C. Co. v. Frear,* 127 Fed. 199; *Union T. Co. v. Stearns,* 119 Fed. 790; *Arbuckle v. Blackburn,* 113 Fed. 616; *Boise A. H. & C. W. Co. v. Boise City,* 213 U. S. 276, 29 Sup. Ct. 426; *Cohn v. Wausau B. Co.* 47 Wis. 314, 2 N. W. 546; *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 87 N. W. 561; *Strange v. Oconto L. Co.* 136 Wis. 516, 117 N. W. 1023; *Benz v. Kremer,* 142 Wis. 1, 125 N. W. 99; *Wadhams Oil Co. v. Tracy,* 141 Wis. 150, 123 N. W. 785; *State ex rel. Buell v. Frear,* 146 Wis. 291, 131 N. W. 832; *Allaby v. Mauston E. S. Co.* 135 Wis. 345, 116 N. W. 4; *Whisler v. Wilkinson,* 22 Wis. 572; *Sellers v. Union L. Co.* 39 Wis. 525; *East Hartford v. Hartford B. Co.* 10 How. 511; *State ex rel. Drake v. Doyle,* 40 Wis. 175; *State ex rel. Covenant Mut. Ben. Asso. v. Root,* 83 Wis. 667, 54 N. W. 33; *In re Eldred,* 46 Wis. 530, 1 N. W. 175; *Shively v. Bowlby,* 152 U. S. 1, 14 Sup. Ct. 548; *Barney v. Keokuk,* 94 U. S. 324; *Eldridge v. Trezevant,* 160 U. S. 452, 16 Sup. Ct. 345; *McLennan v. Prentice,* 85 Wis. 427, 55 N. W. 764; *Priewe v. Wis. S. L. & I. Co.* 93 Wis. 534, 67 N. W. 918; *Att'y Gen. ex rel. Askew v. Smith,* 109 Wis. 532, 85 N. W. 512; *Ill. S. Co. v. Bilot,* 109 Wis. 418, 84 N. W. 855, 85

N. W. 402; *Pewaukee v. Savoy,* 103 Wis. 271, 79 N. W. 436; *Scranton v. Wheeler,* 179 U. S. 141, 21 Sup. Ct. 48; *Tewksbury v. Schulenberg,* 41 Wis. 584; *Delaplaine v. C. & N. W. R. Co.* 42 Wis. 214; *Harrington v. Edwards,* 17 Wis. 586; *Yates v. Judd,* 18 Wis. 118; *Boorman v. Sunnuchs,* 42 Wis. 233; *J. S. Keator L. Co. v. St. Croix B. Corp.* 72 Wis. 62, 38 N. W. 529; *Pollard's Lessee v. Hagan,* 3 How. 212; *Gilman v. Philadelphia,* 3 Wall. 713; *Stockton v. B. & N. Y. R. Co.* 32 Fed. 9; *Salliotte v. King B. Co.* 122 Fed. 378; *Manigault v. Springs,* 199 U. S. 473, 26 Sup. Ct. 127; *Noble State Bank v. Haskell,* 219 U. S. 104, 31 Sup. Ct. 186; *Munn v. Illinois,* 94 U. S. 113; *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209; *Newcomb v. Smith,* 2 Pin. 131; *Pratt v. Brown,* 3 Wis. 603; *Fisher v. Horicon I. & M. Co.* 10 Wis. 351; *Walker v. Shasta P. Co.* 160 Fed. 856; *Hackett v. Ottawa,* 99 U. S. 86; *Blair v. Cuming Co.* 111 U. S. 363, 4 Sup. Ct. 449; *Burlington Tp. v. Beasley,* 94 U. S. 310; *Charlotte, C. & A. R. Co. v. Gibbes,* 142 U. S. 386, 12 Sup. Ct. 255; *Georgia R. & B. Co. v. Smith,* 128 U. S. 174, 9 Sup. Ct. 147; *Cawker v. Meyer,* 147 Wis. 320, 133 N. W. 157; *Union L. Co. v. Railroad Comm.* 144 Wis. 523, 129 N. W. 605; *Hudson Co. W. Co. v. McCarter,* 209 U. S. 349, 28 Sup. Ct. 529; *Bacon v. Walker,* 204 U. S. 311, 27 Sup. Ct. 289; *Bittenhaus v. Johnston,* 92 Wis. 588, 66 N. W. 805; *Barbier v. Connolly,* 113 U. S. 27, 5 Sup. Ct. 357; *Propeller Genesee Chief v. Fitzhugh,* 12 How. 443; *The Daniel Ball,* 10 Wall. 557; sec. 1596, Stats. (1898); 30 U. S. Stats. at Large, 1151, sec. 9 (6 Fed. Stats. Ann. 605); *Enos v. Hamilton,* 24 Wis. 658; *Chapin v. Crusen,* 31 Wis. 209; *Pennsylvania College Cases,* 13 Wall. 190; *Mumma v. Potomac Co.* 8 Pet. 281; *Greenwood v. Freight Co.* 105 U. S. 13; *Sinking Fund Cases,* 99 U. S. 700; *Calder v. State ex rel. Att'y Gen.* 218 U. S. 591, 31 Sup. Ct. 122; *West Wis. R. Co. v. Trempealeau Co.* 35 Wis. 257; *State ex rel. Cream City R. Co. v. Hilbert,* 72 Wis. 184, 39 N. W. 326; *Proprietors v. Proprietors,* 11 Pet. 420;

Fletcher v. Peck, 6 Cranch, 87; *Sunset T. & T. Co. v. Medford,* 115 Fed. 202; *Hatch v. Lusignan,* 117 Wis. 428, 94 N. W. 332; *Kahn v. Lesser,* 97 Wis. 217, 72 N. W. 739; *Railroad Co. v. Schurmeir,* 7 Wall. 272; *Wright v. Day,* 33 Wis. 260; *Oborn v. State,* 143 Wis. 249, 126 N. W. 737; *Ex parte Young,* 209 U. S. 123, 28 Sup. Ct. 441; *Quiggle v. Herman,* 131 Wis. 379, 111 N. W. 479; *Blackstone v. Miller,* 188 U. S. 189, 23 Sup. Ct. 277; *Ambrosini v. U. S.* 187 U. S. 1, 23 Sup. Ct. 1; *State ex rel. Att'y Gen. v. Norcross,* 132 Wis. 534, 112 N. W. 40; *Rundle v. Delaware & R. C. Co.* 14 How. 80, 91; *Black River Imp. Co. v. La Crosse B. & T. Co.* 54 Wis. 659, 11 N. W. 443; sec. 1, art. II, Const.; *Weber v. Board of Harbor Comm'rs,* 18 Wall. 57; *Tyler v. Wilkinson,* 4 Mason, 397; *McCready v. Virginia,* 94 U. S. 391.

TIMLIN, J. The statute in question is entitled "An act to amend section 1596, and to create section 1596*a* of the Statutes, relating to the construction and maintenance of dams in or across navigable waters, and to create sections 1596—1 to 1596—76, both inclusive, of the Statutes, relating to the granting of franchises authorizing the improvement of navigation and the development of hydraulic power created by such improvement, providing for a franchise fee therefor, and making an appropriation."

In this opinion the sections of this act will be referred to as secs. 1596, 1596*a*, and by the subsection numbers 1 to 76.

Epitomized, the act in question presents a comprehensive plan by which all existing dam charters capable of repeal are repealed, and henceforward the matter of new charters for dams in navigable waters is committed to the *Railroad Commission* to determine the facts, issue certificates, make and enforce conditions, exercise supervision, etc. Upon the finding of the *Commission* that the requisite facts do not exist, a franchise is refused. Upon the *Commission's* finding of the existence of the requisite facts, the statute grants a franchise

imposing conditions hereinafter referred to, which franchise, in order to take effect, must be accepted by the applicant with its conditions. To induce or compel the holders of existing property of this kind whose charters are repealed to come under the act, the latter declares such property a nuisance, forbids its use, and imposes penalties. The charters so obtained through the *Railroad Commission* are for a limited time, at the end of which some third person, or a municipality, or the state, is, by reason of the conditions acceded to and upon a described measure of compensation, to become by condemnation the owner of all such property. There are several hundred charters enacted by former legislatures of this state and of the preceding territorial government authorizing the building of dams in the navigable waters of this state in aid of navigation, and most of these have been accepted by construction of the required works in aid of navigation.

The pleadings present that relators are property owners whose property is threatened by this act with destruction or confiscation, and placed without the protection of law by declaration that it is a public nuisance and the imposition of penalties for using the same. This is a private wrong calling for the interposition of equity *quia timet*. The pleadings also show that all improvements to navigation recognized by former statutes as such and so recognized in the statute in question, and made in all the navigable rivers in the state within the last sixty or seventy years and now existing, are threatened with abatement and destruction and their up-keep and use penalized except upon conditions charged to be invalid and unenforceable. This is a threatened public wrong affecting the sovereignty and prerogatives of the state and calling for redress by injunction. *Att'y Gen. v. Eau Claire,* 37 Wis. 400; *State v. Eau Claire,* 40 Wis. 533. There may be other grounds for the exercise of original jurisdiction and other questions *publici juris* in the case, but the foregoing is sufficient. There cannot be much doubt of this as regards the de-

fendants constituting the *Railroad Commission,* and as to the other defendants the question is closed by *State ex rel. Bolens v. Frear, post,* p. 456, 134 N. W. 673, 135 N. W. 164.

We approach the grave questions involved with the utmost deference to the co-ordinate branches of government which have passed upon the same. We shall treat the enactment as a measure in aid and regulation of navigation as it purports to be, and, except where convinced beyond a reasonable doubt to the contrary, shall hold its requirements constitutional and valid. We shall not attempt to define the extent or set the limits of the reserved right of repeal contained in the constitution of this state (sec. 1, art. XI) or in a charter further than to say that such power does not authorize the confiscation or destruction of property or its taking without just compensation. It is to be construed like all constitutional provisions to harmonize with other commands and restrictions of the same instrument, and it must always yield to that paramount provision of the federal constitution which forbids the state to deprive any person of life, liberty, or property without due process of law and to the substantial equivalent of the latter in our state constitution. Sec. 9, art. I; *Janesville v. Carpenter,* 77 Wis. 288, 46 N. W. 128; *State ex rel. Kellogg v. Currens,* 111 Wis. 431, 435, 87 N. W. 561; *Adirondack R. Co. v. New York,* 176 U. S. 335, 20 Sup. Ct. 460; *People ex rel. Schurz v. Cook,* 148 U. S. 397, 13 Sup. Ct. 645; *Pearsall v. G. N. R. Co.* 161 U. S. 646, 16 Sup. Ct. 705; *Bank of Commerce v. Tennessee,* 163 U. S. 416, 16 Sup. Ct. 1113; *Shields v. Ohio,* 95 U. S. 319; *Greenwood v. Freight Co.* 105 U. S. 13; *Wilmington City R. Co. v. Wilmington & B. S. R. Co.* 1 Del. Ch. App. 468, 46 Atl. 12. We may now take up for analysis the details of the act in question.

Sec. 1596 as amended extends somewhat the former statutory description of what streams are navigable, forbids obstructions therein, declares dams, bridges, or other obstructions maintained in violation of this section to be public nui-

sances, provides for their abatement, and imposes penalties. It is general in its terms and within well recognized legislative power, and has little or no connection with what follows. We hold this section to be prospective so far as it refers to streams not theretofore within the purview of the section it purports to amend, and to affect only dams in such streams placed there after the amended statute went into effect. It need not be further noticed. Sec. 1596*a* forbids any person, etc., to "conduct or maintain or operate or use any dam or other improvements in or across" any navigable stream without having, holding, or obtaining a franchise from the state authorizing the construction or maintenance and operation of such dam or improvements. Paragraph 2 of this section declares any dam or improvements constructed or maintained in violation of sec. 1596*a* to be a public nuisance. We note the broad language of this prohibition forbidding the maintenance, operation, or use of either the dam or other improvements without a franchise. We are not left in doubt as to the meaning of the word *franchise*. "Franchise" as used in this act is there defined to mean a grant of authority under the provisions of this act, not a prior existing franchise. Sec. 5, par. 3.

"Improvements" is defined in the act to mean the dam itself and all weirs, tunnels, races, flumes, sluices, pits, locks, chutes, boat hoists, marine railways, fishways, and other structures, machines, and devices necessary or essential for the development of hydraulic power and for the generation of mechanical energy or electrical energy, or both, constructed within or made part of such dam or dams. This word in the act also means such machines, connections, regulations, and transmission devices as may be found by the *Railroad Commission* to be necessary for the utilization of energy in connection with the proposed improvement. It also includes all reservoir, flowage, and other rights and easements and all lands necessary and used under such franchise for the main-

tenance of such dam or dams and the structures and devices above enumerated. Sec. 5, par. 6. We notice, in passing, the sweeping language of this paragraph and that none of the things there enumerated and described may be used, and that in the absence of the franchise under this act all are declared to constitute a public nuisance. It is further provided in sec. 1596*a* that either the construction of any such dam or "improvements" or their maintenance may be abated at the suit of the state or of any private citizen. Sec. 1 declares that the use of navigable waters for power developed under a franchise "granted under the provisions of this act" is a public use, thus attempting to give the use under the franchise that effect. Secs. 2, 3, and 4 are to the effect that all energy, developed or undeveloped, of the navigable waters of the state is subject to the control of the state for public good, and that the beneficial use and natural energy of the navigable waters of this state for all public uses are held by the state in trust for all of the people and that the state reserves the management, control, etc. It is contended by the relators that secs. 2, 3, and 4 amount to an assumption of proprietorship of the energy of falling water on the part of the state; but counsel for defendants, including the senator who introduced the bill in question, contend that no such meaning can be given to these sections and that they only assert the possession by the state of the power to regulate the production of such energy in and from navigable waters and the instruments of such production. These provisions seem fairly capable of the latter meaning, and under our duty to uphold the law if this can be done we must give them such meaning as is required for their support and validity. We need say no more concerning secs. 2, 3, and 4, regarding them merely as declaratory of sovereign power in a somewhat general declamatory way. Sec. 6 provides that every franchise granted under the provisions of this act shall be granted for the purpose of improving the navigation of navigable waters, and shall include the right to construct and maintain dams or

improvements therein for said purpose, or for said purpose and other lawful purposes, and shall include the right to utilize under the terms, conditions, and provisions of the act any hydraulic power created and developed by virtue of the improvements, and every such franchise *shall contain and embrace all the terms, provisions, and conditions of the act.* This requirement is industriously repeated in varying forms of expression. It is found in paragraph 2 of sec. 24, which purports to extend, upon application of the owner, repealed franchises. "A franchise therefor, subject to all the terms, conditions, and provisions of this act, is hereby granted to such applicant." It is found in sec. 28, and there appears one of these "terms and conditions" to the effect that at the termination of any franchise granted under the provisions of this act by expiration, forfeiture, *repeal, or otherwise* the improvements erected, maintained, held, enjoyed, and used and useful in connection with the improvement, may be taken by any appropriator by condemnation proceedings, and the retiring appropriator in accepting the franchise will be deemed to have agreed that this appropriator may do so by paying just compensation. But just compensation shall not include the full value at the time taken, but only the value at the time the franchise under this act was granted, if the riparian owned the land or the land and improvements when he applied for the franchise. Also that no allowance shall be made for the franchise or any rights or privileges included therein. Sec. 29 provides that no franchise granted pursuant to the provisions of this act shall become effective and be in force unless within ninety days after notice from the *Railroad Commission* that the same has been granted the applicant shall file with the *Railroad Commission* a written acceptance thereof. Sec. 30 requires as one of the terms and conditions of the act that the franchise granted thereunder shall be for a term of twenty years only, but the appropriator or successors or assigns shall have a right of continuance of the same

for two further and successive terms of ten years each. Sec. 33 provides that every franchise granted under the provisions of this act is accepted, taken, and held subject to all the terms, conditions, and provisions of such franchise and of this act, and is so accepted, taken, and held in consideration of the powers, privileges, and prerogatives conferred by said franchise. Sec. 36 provides for the payment of an annual franchise fee which the acceptor must consent to. Sec. 37 provides for a forfeiture of the franchise for nonpayment. Sec. 38, that the state shall have a preferred lien, second only to the lien of taxes, to secure this franchise fee. Sec. 41 provides that every franchise granted under the provisions of this act is subject to the express condition that the state, when it shall have the constitutional power, may at the termination of the twenty- or either ten-year period acquire by purchase, lease, or condemnation all improvements, etc., upon the same basis of valuation as a municipality. Sec. 42 provides that at the end of either such period any municipality may acquire any improvements constructed and maintained by any appropriator under such franchise, compensation for such improvements to be determined by the *Railroad Commission;* and then the following:

"Any appropriator by the acceptance of a franchise granted under the provisions of this act shall be deemed, by the acceptance thereof, to have agreed that any municipality or the state may acquire all dams and improvements acquired, erected, and maintained or used or useful under the franchise of said appropriator by paying just compensation therefor, and that in determining such just compensation no allowance shall be made to such appropriator for any increase in the value of any lands acquired or used or useful under such franchise, over and above the value of such lands at the time of the granting of such franchise, if the same were previously acquired, or at the time of acquisition, if the same were acquired subsequent to the granting of such franchise, and that no allowance shall be made for such franchise *or any rights or privileges included therein.*"

Sec. 26 imposes a penalty of $50 per day for any exercise or attempted exercise of any power, rights, or privileges under any repealed charter. The owner of any dam who has constructed the same in aid of navigation under authority from the legislature of this state by this act which recognizes that his dam is still an aid to navigation because it offers him a charter to maintain it for that purpose, must either submit to be deprived of the use of the property described under the term "improvements" and to have this property, including the dam and the riparian land, declared a public nuisance out of the protection of the law and liable to abatement, or agree to the foregoing conditions as well as some others not specially mentioned herein. We may, however, note that by sec. 1, taken with the other sections above referred to (in addition to other concessions), the water-power proprietor by accepting this new charter consents that his property shall become impressed with a public use. In short, the statute in these respects is equivalent to a statute declaring the dam a public nuisance and its maintenance or use a misdemeanor, unless the owner pays to the state an annual franchise fee and surrenders his fee simple estate for a limited or terminable fee and agrees that his property be impressed with a public use and that it may be taken by an "appropriator," by a municipality, or by the state at less than the just compensation which the constitution secures to others, and consents to all the other requirements of the act. If he make these payments and concessions and yield up these property rights, his property will continue as it was, a lawful structure and an aid to navigation, otherwise not.

Here we may consider sec. 23.

"Every license, permit, or franchise authorizing the erection and maintenance of any dam in or across any navigable stream, heretofore granted and which by the terms thereof or otherwise is subject to repeal, is hereby repealed, such repeal to take effect and be in force six months after the passage and publication of this act."

In order to get the full force and effect of this we must take a glance at conditions to which it is made applicable. During the whole past life of this state and prior to its existence the policy of the legislature, truly representing public sentiment in that respect, was to freely grant charters for the erection of dams in the navigable rivers of the state in aid of navigation. The legislature granted the charter in consideration that the grantee would make the improvement in aid of navigation; the latter accepted the offer and invested thousands of dollars in making the improvement; not as a philanthropist or because he desired to expend money in aid of navigation, but in order to acquire for himself the valuable water power thus produced or increased. The legislature understood and approved this purpose and this consequence. In the judgment of the legislature the navigation was improved, and this was the consideration received by the state. A water power was created or improved, and the ownership of this was the consideration received by the grantee. Such policy was also considered essential to the settlement of the state and the development of its property resources. By contract with the state, therefore, the riparian owner bought and paid for this valuable property right so far as the state had power to grant it. He had also acquired by purchase the riparian right hereinafter referred to. These two in combination caused or created the water power. These property rights so created increased in number and value until the present time when there are hundreds of such dams and millions of dollars invested therein. Manufacturing industries operated by such water powers were established, and here further investments made and rights acquired. Villages and cities sprung up and clustered around such factories. New riparian rights arose and vested in these landowners or lotowners abutting on the raised water above the dam, and the erstwhile overflowed land below the dam was bought, built upon, and improved; the watercourse acquired new banks and boundaries; all such conditions ad-

justing themselves to the improvement. These factories and their concomitant villages and cities furnished labor and a livelihood to thousands of artisans and a market for thousands of farmers. Titles and values became dependent on the continuance of the conditions thus created. In the years that elapsed those holding and acting on such beliefs invested their savings, reared and educated their children, and the latter inherited the property and pursued the honorable avocations of their parents, or by good fortune or special ability rose in some other walk of life, or entered the learned professions, or became themselves *entrepreneurs* and acquired and owned in whole or in part or operated the same or other similar water powers. As a result of this material progress the year 1910 found this state with two and one-third million of population, owning more than two and one-half billion dollars worth of taxable property and having two hundred fifty-eight million dollars deposited in banks and six million dollars in trust companies within the state. Under such conditions the creation and vesting of many property rights depending upon the continuance of such improvements was inevitable. Industry and self-denial were stimulated and rewarded by the acquisition of property, and the property rights of the people thus acquired secured to them by laws. Paramount among these laws was the constitutional command that private property should not be taken for public use without just compensation, and by necessary inference that it should not be taken for private use at all. There was also the command of the federal constitution, harking back to Magna Carta, that no person should be deprived of his property without due process of law or denied the equal protection of the laws. The charters granted by the state during the period referred to may be classified as follows: First, those granted to natural persons and complied with by the latter, reserving no right of repeal. These, by all the authorities, constitute a contract not subject to repeal at the pleasure of the state. Second, those granted

with or without such reserved power of repeal and never accepted or complied with. These are subject to repeal or ouster by *quo warranto.* Third, those granted to natural persons, reserving in the charter the power of repeal, and those granted to corporations, both accepted by complying therewith in constructing the aids to navigation required. As to this third class, assuming that they are meant to be covered by sec. 23 of the act, we have not merely a repeal but a confiscation of property, taking all the provisions of the act together. The state still continues to use the improvement. It recognizes that it is still an aid to navigation. The improvement performs its office of holding back the flood as before, and if it ever was a public benefit it is by the lapse of time more so at present. It is, however, declared a public nuisance, but permitted to remain and do its work, and the state offers its aid by delegation of the sovereign power of eminent domain to any third person to acquire this property from the first owner and immediately the ban is removed. That which was temporarily and nominally a public nuisance becomes again, without any change in its physical condition, a lawful structure, and it resumes its original status as an aid to navigation and entitled to the protection of the law. But the appropriator may not appear for years. There is no certainty that he or it will ever come. The first owner is to have compensation for his property only in case this appropriator turns up. In the meantime the property is put without the protection of law and its use declared a misdemeanor. Such provision for compensation is invalid within the rule of *Powers v. Bears,* 12 Wis. 213; *Shepardson v. M. & B. R. Co.* 6 Wis. 605, and cases cited in 15 Cyc. 642, note 65. We may say here, therefore, that there is no provision for compensation, because such inadequate and invalid provision is equivalent to none at all. But the act not only purports to repeal the charter but to take the property, because the state not only permits it to remain, performing its former function as an

aid to navigation, but undertakes to sell or grant the use of it for a consideration to any third person who will accede to the state's terms. The legislature in the exercise of its power of regulation or police power may within certain limits declare what acts shall constitute a nuisance, but this power cannot be made a cloak for confiscation. "The legislature has no right arbitrarily to declare that a nuisance which in fact is not so." *Lawton v. Steele,* 152 U. S. 133, 14 Sup. Ct. 499, and cases; *Priewe v. Wis. S. L. & I. Co.* 93 Wis. 534, 67 N. W. 918. The legislature, therefore, has no such power over private property in the lawful enjoyment of some person as to declare it a nuisance and make its use a misdemeanor without providing compensation to the owner. *Wynehamer v. People,* 13 N. Y. 378 *et seq.* The state has power in aid of navigation to regulate the use of the navigable waters and to authorize such improvements in aid of navigation, and all incorporeal riparian rights and all rights of the riparian owner in and to the bed of the stream are subject and subordinate to this power of the state. So are these rights, like all other property rights, subject to state regulation to a degree commensurate with the nature of the property, its dangerous or its semi-public character, or any other peculiar character or quality it may possess requiring greater or less regulation. All the police power of the state is applicable to such property and the enjoyment thereof. But such incorporeal riparian rights are not, as against the riparian owner, subject or subordinate to any salable or demisable right of the state, or to any claim of the state for compensation therefor, or to any grant of the state to a third person for the purpose of manufacturing or of using or selling water power. They may be taken for the latter uses when such uses are public, but only upon compensation. The improvement of navigation being in itself lawful, the riparian owner can recover for no consequential damages flowing therefrom. *Black River Imp. Co. v. La Crosse B. & T. Co.* 54 Wis. 659, 11 N. W. 443.

But even the right of navigation or the improvement of the navigable waters for navigation purposes will not justify the taking of the bank without compensation to the owner. *Cohn v. Wausau B. Co.* 47 Wis. 314, 322, 2 N. W. 546; *Pumpelly v. Green Bay Co.* 13 Wall. 166, and cases in Rose's Notes. The questions here presented more directly relate to taking property for a private purpose without compensation and not in aid of navigation. The interest of navigation is not affected by the ownership of the resulting water power. We consider that declaring the property a nuisance and penalizing its use is a taking within the meaning of the constitution, and that the alternative provided in this act, by which the owner may escape this taking by consenting that his private property be impressed with a public use by surrendering up to the state his property, or some interest therein, or part of his right to compensation, or his ownership of the water power, or his privilege to continue his property in its advantageous condition so long as it is a lawful aid to navigation until the state takes it for a public use on making compensation, is but another form of taking his property. *Wilmington City R. Co. v. Wilmington & B. S. R. Co.* 1 Del. Ch. App. 468, 518, 46 Atl. 12. "Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration." *Shields v. Ohio,* 95 U. S. 319; *Greenwood v. Freight Co.* 105 U. S. 13. Whatever property is acquired under such a charter prior to its repeal is held under the same guaranties which protect other property. *County of Santa Clara v. S. Pac. R. Co.* 18 Fed. 385; *Lothrop v. Stedman,* 42 Conn. 583; *Comm'rs v. Holyoke W. P. Co.* 104 Mass. 446. We may also cite, without committing this court to everything contained therein, *People v. O'Brien,* 111 N. Y. 1. Other provisions of that act apply not only to those riparian owners who under a charter have constructed a dam, but to riparian owners who as yet have neither charter nor dam. Sec. 8 authorizes any person, firm, domestic corporation, or municipality, whether a ripa-

rian owner or not, to apply to the *Railroad Commission* for a franchise. When he makes his application he is by par. 4 of sec. 5 the applicant; after he receives it he is by par. 5 of sec. 5 the appropriator. The significance of these statutory definitions must not be overlooked, because the word "appropriator" is often used in other portions of the act, and certain rights and powers conferred upon and certain duties imposed upon the "appropriator." A hearing before the *Railroad Commission* is provided. Where it appears to that body by evidence that the proposed improvement will result in the improvement of navigation, that all dams and other improvements proposed will be adequate and will not endanger health, life, or property, and that the interests of the public will be better served by the construction, etc., of such improvement, and, if its purpose be to develop hydraulic power, that the same will result in the efficient development thereof, the *Railroad Commission* shall so find and the applicant is entitled to a franchise. If they find the contrary he is not entitled to a franchise. Having such authority flowing from the statute, acting upon the findings of the *Railroad Commission,* he becomes and is an appropriator, and is subject to all the conditions hereinbefore mentioned. This appropriator has the right of taking the land of any riparian owner and all the appurtenances of such land and all riparian rights belonging to such land for the purpose of constructing the dam authorized by statute. Upon this person receiving this franchise is conferred, by sec. 7, the right to utilize for any lawful purpose any hydraulic power created or developed by virtue of any improvement authorized by any franchise. Any person not a riparian owner may also apply for a franchise where another person whose charter or license has been repealed by the act fails to apply within the time specified in the act, and in either case either of these persons may exercise the power of eminent domain and condemn the riparian's property with all its appurtenances but without improvements in the first case, and with its improvements and

appurtenances in the second. Secs. 25, 28, and 46. This person so authorized to invoke the state power of eminent domain and institute and carry out the condemnation proceedings, should he develop hydraulic power under the franchise, is authorized and required to lease or dispose of such power and any electrical energy derived therefrom to the public without discrimination and at a reasonable rate; "however, said appropriator may retain and use as much of said hydraulic power and electrical energy as shall be reasonably necessary for its own purpose or purposes." Sec. 51. If public convenience and necessity require it he shall develop all the hydraulic power created by such dam and transform any or all of such power not reasonably necessary for the purpose or purposes of said appropriator into electrical energy, and shall transmit the same, *or such part thereof as is not reasonably necessary for the purpose or purposes of such appropriator,* for sale to the public. This purports to authorize the taking of the land of a riparian owner, unimproved or improved, by one not a riparian owner, who has the right to employ all or part of the most valuable use of such land to his own private purposes. It is quite a different thing to impose upon a corporation to which the power of eminent domain is delegated public duties (*Wis. River Imp. Co. v. Pier,* 137 Wis. 325, 118 N. W. 857) and to declare that a given use for the benefit of the owner of property is a public use. This last is what the legislature attempted to do here. If the legislature could, by mere fiat, make any use of property a public use, all private property could in this way be subjected to these drastic regulations justified by a public use. "All the courts, we believe, concur in holding that whether a particular use is public or not, within the meaning of the constitution, is a question for the judiciary." *Wis. W. Co. v. Winans,* 85 Wis. 26, 40, 54 N. W. 1003, citing Lewis, Eminent Domain, § 158; *Talbot v. Hudson,* 16 Gray, 417; and other cases. The use of water power by a manufacturer for his own pur-

poses is a private use and is not on the basis of a sale of power to the public. This part of the act therefore falls.

The right of the riparian owner to use the water of the river on his own land within his boundary determined by ordinary high-water mark, for the purpose of creating power or, as the act in question puts it, "developing energy," returning the water again to the stream, is unquestionably a private right appurtenant to the riparian land. The idea of a legal ownership of the "energy" of falling water by one who owns neither the water which falls nor the land the declivity of which causes the fall has been analyzed and criticised by counsel for relators. But counsel for defendants disclaim any such meaning for the statute in question, no doubt finding a different position, in their opinion, untenable. It is conceded there is such a riparian right as the right to use the water for power, and also that this right is to be exercised in subordination to the public right of navigation and the necessary accessories of the latter. We say that if the exercise of this riparian right, in the judgment of the legislature, interferes with the public right of navigation, it may be forbidden. But as has been said by Judge COOLEY in *Middleton v. Flat River B. Co.* 27 Mich. 533: "Each right should be enjoyed with due regard to the existence and protection of the other." Or, as he says in *Buchanan v. Grand River & G. L. R. Co.* 48 Mich. 364, 367, 12 N. W. 490: "Each right modifies the other and may perhaps render it less valuable, but this fact, if the enjoyment of the right is in itself reasonable and considerate, can furnish no ground for complaint." Where the ownership of the bank is essential to the construction of a dam or the creation or development of a water power, the state is as helpless to use, sell, or lease such right without condemnation and compensation as the riparian owner is to intrude into the navigable stream without consent of the state. It requires the concurrence of the riparian owner and the state in such case to make the water power efficient, and this right of the riparian owner

to refuse to concur and stand out for compensation, in the case mentioned, is a private property right and often gives to such land its chief value. The state may refuse its permission to the riparian owner to build a dam and may attach conditions to its consent, such as the height, strength, mode of construction, etc., of the dam, and perhaps other conditions, but it may not seize upon this right without compensation and use it or sell it or lease it to another. It cannot authorize the use and enjoyment of this right by a person not a riparian owner for a private purpose without the consent of the riparian owner, nor for a public purpose without condemnation and compensation to the riparian owner. This principle runs through all the cases. *Green Bay & M. C. Co. v. Kaukauna W. P. Co.* 70 Wis. 635, 35 N. W. 529, 36 N. W. 828; *Koenig v. Watertown,* 104 Wis. 409, 80 N. W. 728; *West v. Fox River P. Co.* 82 Wis. 647, 52 N. W. 803; *Fox River F. & P. Co. v. Kelley,* 70 Wis. 287, 35 N. W. 744; *Kaukauna W. P. Co. v. Green Bay & M. C. Co.* 75 Wis. 385, 44 N. W. 638; *A. C. Conn Co. v. Little Suamico L. Mfg. Co.* 74 Wis. 652, 43 N. W. 660; *Wis. River Imp. Co. v. Pier,* 137 Wis. 325, 118 N. W. 857. Many other cases will be found cited in the briefs of counsel for relators. These premises support the conclusion that the act in question attempts to deprive the owners of improved riparian land and of the resulting water power, and owners of unimproved riparian land with its appurtenant water-power privileges and advantages, of property without due process of law; that it attempts to authorize the taking of private property for private purposes; and that it attempts to take property without just compensation. The act in question, in the particulars mentioned, is inconsistent with the paramount commands of the state and of the federal constitution applicable to the same facts and conditions. Hence we cannot recognize it as law. We must faithfully observe and give force to those constitutional restrictions upon the legislative power, which we have not the slightest doubt

apply in the instant case. It is contended that the statute may be sustained in part, and the legislature seems to have had some misgivings concerning the constitutionality of portions of the act, because it is therein declared that secs. 1, 2, 3, 23, and 73 are to be considered separable or independent portions thereof, and that any one or all of said sections may fail or be declared invalid without affecting any other section or sections of the act. Also that it was the further intention of the legislature that if any other separable or independent portion of the act, not necessary for the accomplishment of the main purpose sought to be accomplished thereby, fails, the remainder of said act should not be affected by the failure of such separable or independent portion. This may be some indication of legislative intention, but we regard it as merely declaratory of the rules heretofore laid down by this court on the same subject and which are rules of constitutional law. What is the main purpose of the act? Manifestly to establish a new system, by which the granting of charters for dams should be referred to the *Railroad Commission* for findings, the construction, regulation, and up-keep thereof subject to the authority of that *Commission,* and that the state should from henceforth exact a franchise fee, and that all should be coerced to come in under this act and consent to the conditions of the new charter, and that the public, either a municipality or the state, should finally succeed to the ownership of all water powers of the state. Sec. 1596 is not necessary to the accomplishment of this main purpose. But all the rest of the act appears to be. The *Commission* is not authorized to act, except with reference to the granting of a charter containing conditions here held invalid; their powers of administration and supervision come into force and are dependent upon the confiscatory features of the act. Their acts have the legal effect given to them by this invalid statute or no effect. Neither the appropriator nor the municipality nor the state can take the property as herein provided. The terms of the

new charter cannot be enforced, and the outlawry of the property and the penalties are invalid. There is nothing left but a confused detail of incoherent provisions. In order for part of an act to be upheld as separable it is essential that such part found to be within the constitutional power of the legislature forms, independently of the invalid part, a complete law in some reasonable aspect, so that it may fairly be concluded that the legislature would have enacted the same without the invalid portions. When a legislative enactment has an all-pervading purpose coupled with minor details and administrative features and this purpose is unconstitutional, such minor details and administrative features cannot survive condemnation of the main purpose.

All the features of this act, aside from those specifically mentioned, are mere details or administrative features of the act. Thus the all-pervading necessary effect of such chapter is to take property which is in fact private, for a purpose declared to be public, without rendering any compensation therefor. The necessary effect, if enforced,—and so the purpose in a legal sense,—of ch. 652, Laws of 1911, being state appropriation of the private property rights of riparian proprietors owning the banks of navigable rivers, in a manner not warranted by the fundamental law, and those portions of the act which do not directly deal with the assertion of state title, being merely features designed to render such assertion efficacious, it all forms an inseparable and an unconstitutional entirety.

By the Court.—A writ of injunction is awarded restraining the defendants from acting under or attempting to enforce the provisions of this act except sec. 1596 thereof.

KERWIN and BARNES, JJ., took no part.

MICKUCZAUSKI, Respondent, vs. HELMHOLZ MITTEN COMPANY, Appellant.

January 9—January 30, 1912.

Master and servant: Injury from defective machinery: Abnormal and unexpected movements: Questions for jury: Contributory negligence: Evidence: Instructions to jury: Special verdict.

1. In an action for injuries to plaintiff's hands, caused by the unexpected descent of the heavy beam of a beam-die press machine, used for cutting mitten linings, at which he was working, there was evidence that, upon pressure being applied to a treadle, when the machine was in perfect condition the beam made one complete movement down and up and, upon the pressure being released, came to a stop above the die to permit the removal of linings and the placing of cloth for cutting; that, by reason of defects in the machine, linings were at times only partially cut and the work of removing them became difficult; and that while plaintiff was removing partially cut linings after the beam had stopped above the die, it descended without any pressure upon the treadle and caused the injury complained of. There was also evidence that the plaintiff was a man of low intelligence and could speak but little English; that he was not familiar with machinery and at first objected to working at the machine, but finally consented to do so; that he did not know the beam would descend without pressure upon the treadle; that the instructions given him by defendant's foreman were general in character, confined to ordinary use of the machine; that plaintiff was not instructed to use a stick in removing the linings, though one was used customarily and was safer; that in giving the instructions the foreman placed his own hands under the beam; and that no warning of danger was given to plaintiff. Several witnesses testified that before plaintiff's injury the beam had slipped down many times as the result of abnormal and unexpected action, giving various defects as reasons therefor; that defendant's superintendent knew thereof; and that the machinery operated in the same way afterwards. *Held*, that the question of contributory negligence was one for the jury.
2. The mechanical impossibility of such irregular movements of the beam was not in this case such an established or conceded fact as to overcome the testimony of numerous witnesses, shown to

be in a position to know and having special knowledge on the subject, that they could and did occur; and it was therefore for the jury to determine the fact. *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, distinguished.

3. Findings of the jury to the effect that prior to plaintiff's injury the machine was liable to get in such condition that while being operated the beam would sometimes come down to the die without any pressure being applied to the treadle; that defendant had knowledge of that fact, and failed to warn the plaintiff of the danger, and was therein guilty of a want of ordinary care which was the proximate cause of the injury; and that plaintiff was not guilty of contributory negligence,—are *held* to be supported by the evidence.
4. A requested instruction giving prominence to alleged tests of the machine when not in actual use and assuming facts as established upon which the testimony was conflicting, was properly refused.
5. The court may properly refuse to submit for special verdict proposed questions which relate to merely evidentiary matters and which, so far as they relate to ultimate issuable facts, are covered by other questions.
6. Thus, it was not error in this case to refuse to submit a question requiring the jury to answer specifically which one of several alleged defects in the machine was the cause of the beam falling down upon the die, where the court properly submitted the ultimate question whether such irregular movement was habitual, *i. e.* whether the machine was liable to get into such condition that while being operated the beam would sometimes come down to the die without pressure being applied to the treadle.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This action was brought to recover for personal injuries. On the 16th day of August, 1909, the plaintiff was injured while working at a machine in the defendant's factory known as a beam-die press, which was used for cutting lining for mittens and gloves. The complaint alleges that the machine was complicated, made up of many parts and cog wheels, and had power imparted to it by means of belts, shafts, and pulleys, and that the power was obtained by friction by means of a friction cone being pressed into and against a shell of a belt

pulley by a clutch collar on the main shaft which was caused to move by pressure transmitted by means of rods and motion joints from a foot treadle along the front of the machine near the floor, and that the power could be released by moving the foot treadle up such a distance as to move back the friction cone from the shell, and that as part of the machine there was a heavy iron beam suspended over a wooden block upon which material out of which linings were to be cut was placed, and upon which dies placed upon the material were forced through it when the beam moved downward upon the material, dies, and block. The complaint as amended further alleges:

"That on or about the 16th day of August, A. D. 1909, and for a long time prior thereto, said defendant carelessly and negligently maintained said machine in its said factory building in an improper and unsafe condition, in that, among other things, the said machine was permitted to be operated without a stopping device, commonly called a brake, to stop said machine when power was released, and without any device to prevent said machine, and particularly said iron beam, from continuing with its said momentum and the momentum of the said machinery and from coming down whenever in the operation of the said machine it became necessary to stop the said iron beam in its downward course, and in that the said defendant carelessly and negligently permitted the said machine to be operated in its said factory building with a worn, old, loose, and insufficient brake, and with a brake in such defective condition so that the same would not prevent the said iron beam from continuing in its downward course after the said beam had been lowered and raised by means of pressure on the said treadle, and after such pressure had been removed, and permitted the said machine to be operated in such condition on the said 16th day of August, 1909, and for a long time prior thereto, so that the said iron beam would make abnormal and irregular motions, and without any automatic device to throw the said machine out of gear when the beam reached the top of the stroke on its return, and without any device to hold the said beam at the top of its stroke on its return, and without any device to prevent the said iron beam from coming

down whenever the operator thereof was required to have his hands under the said iron beam, and in that the said defendant on August 16, A. D. 1909, and for a long time prior thereto, carelessly and negligently failed to provide for use with the said machine any block or prop to prevent the said iron beam from coming down upon the said wooden block whenever the operator thereof was required to have his hands under the said iron beam; and that the said defendant carelessly and negligently on the 16th day of August, A. D. 1909, and for a long time prior thereto, permitted the said friction cone and the said belts and pulleys and the said clutch collar to be uncovered and unguarded and in such condition that foreign material was likely to become lodged between the said clutch collar and that part of the frame which constituted the boxing for the main shaft, and the said part so described to be in such condition that power would likely be imparted and likely continue to be imparted to the said iron beam after the operator thereof had pressed down the treadle thereon and removed his foot from the said treadle; that the said defendant carelessly and negligently on August 16, 1909, and for a long time prior thereto, permitted the spring attached to the said foot treadle and the said foot treadle to be and become so loose, defective, strained, and out of repair that the same would not operate to remove the power from the said iron beam after the said foot treadle had once been pressed down; and that the said defendant on August 16, A. D. 1909, and for a long time prior thereto, had carelessly and negligently permitted said wooden block and the machinery used to move the same to be and become so loose, defective, and out of repair and so unevenly cut and so worn and chopped up that the same was unfit and improper to be used on the said machine; and that the said defendant carelessly and negligently, on the 16th day of August, A. D. 1909, and for a long time prior thereto, failed and neglected to provide for use in connection with the said machine any proper shelf or other device; and that the said defendant on the 16th day of August, A. D. 1909, carelessly and negligently directed your plaintiff to operate the said machine without warning or instructing your plaintiff as to the proper manner of operating the said machine, and without warning or instructing your plaintiff as to the manner in

which the said machine was operated, and without warning or instructing your plaintiff that the said machine was so devised that the said iron beam would continue to come down if the operator thereof would continue to keep his foot upon the said treadle, and without warning your plaintiff that the said machine was a positive-geared machine and was not equipped with an automatic ungearing device; and that the said defendant on August 16, 1909, carelessly and negligently permitted the said machine to be operated without having the same properly oiled or cleaned.

"That on the 16th day of August, A. D. 1909, the said defendant directed your plaintiff to operate the said machine, and that at such time your plaintiff did not know how to operate the said machine and did not know of the dangers incident to the operation thereof, and that the defendant knew, or ought in the exercise of reasonable care to have known, of such dangers and that your plaintiff did not know of such dangers, and that the defendant directed your plaintiff on such day to cut linings thereon, and that a short time thereafter, while your plaintiff was in the discharge of his duties as such operator, and while he had a portion of his hands under the die, resting on the said block, and while he had all of his said hands under the said iron beam, the said iron beam came down upon the said die and upon your plaintiff's hands, crushing and bruising his hands and cutting off three fingers of his left hand and the thumb of his right hand and otherwise mangling and crushing his said hands; and that the said iron beam was caused to come down upon your said plaintiff's hands and to so injure him by reason of and in consequence of the negligence and carelessness of the defendant hereinbefore alleged, and that such injuries so described were proximately caused by the said negligence and carelessness of the defendant."

The complaint further states that by reason of the injuries received the plaintiff sustained damages in the sum of $20,000.

The answer was substantially a general denial. Motions for nonsuit and directed verdict were made and denied. The court refused to instruct as requested by defendant and to incorporate certain questions in the special verdict.

The jury returned the following verdict:

"(1) Was plaintiff injured on or about August 16, 1909, by having his right thumb and three fingers of the left hand cut off by the beam of a die press coming down on the die? *A.* (by the court). Yes.

"(2) Was the plaintiff so injured by the beam coming down to the die without any pressure being applied to the treadle? *A.* Yes.

"(3) If you answer question 2 'Yes,' then answer this question: Was said machine prior to plaintiff's injury liable to get in a condition in which, when being used, the beam at times would come down to the die without any pressure being applied to the treadle? *A.* Yes.

"(4) If you answer question 3 'Yes,' then answer this question: Did the defendant know that said machine was liable to get in such condition before the plaintiff was injured? *A.* Yes.

"(5) If you answer question No. 4 'No,' then answer this question: Had such machine been so operated for such length of time that the defendant, in the exercise of ordinary care, ought to have known that it was liable to get in said condition before plaintiff was injured? *A.* ——.

"(6) Did the defendant at any time before plaintiff's injury warn plaintiff against the danger to a person using said machine, from the liability of the beam to come down without any pressure being applied to the treadle? *A.* No.

"(7) If you answer questions Nos. 2, 3, and either the fourth or fifth question 'Yes,' then answer this question: Was said defendant guilty of any want of ordinary care in not warning plaintiff against said danger? *A.* Yes.

"(8) If you answer question No. 7 'Yes,' then was such want of ordinary care the proximate cause of plaintiff's injury? *A.* Yes.

"(9) Was the plaintiff guilty of any want of ordinary care which contributed proximately to produce his injury? *A.* No.

"(10) At what sum do you assess plaintiff's damages? *A.* $7,500."

Motion for new trial was denied, and judgment was rendered in favor of the plaintiff upon the verdict, from which this appeal was taken.

Burdette F. Williams and *Lawrence A. Olwell,* for the appellant.

For the respondent there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *W. D. Corrigan* and *W. L. Gold.*

KERWIN, J. Plaintiff at the time of the injury was at work for the defendant at a beam-die press machine used for cutting mitten linings. The machine is made up of four iron uprights which are part of the framework of the machine and bolted to the floor, and has a large wooden block under a cross-beam upon which material is placed while being cut, the cutting die being placed under the beam and pressed down upon and through the material. The cloth is pulled onto the block from a table which stands at the back of the machine and back of where the operator stands. The cloth is placed for cutting by reaching under the beam and pulling it forward. The die is of steel, three and one-half inches high, and the beam caused to descend upon it by pressure exerted upon a foot treadle, or treadle board, which is in front of the operator. The treadle is hung upon a horizontal shaft running across under the machine near the floor and so connected by means of a bell crank, lever, internal expanding brake, collar, clutch, and friction cone at the back of the machine that when the operator presses the treadle down with his foot it releases the internal expanding brake and almost instantaneously engages the friction cone with a shell pulley, which thereupon sets the machine in motion with power supplied from a motor. While the brake is pressed down the beam moves up and down by means of two rods at each end attached to eccentrics on the main shaft so connected by means of cog-wheels with the power shaft that the beam makes one complete movement down and up with each revolution of the eccentrics. Upon removal of the pressure which causes the machine to be set in motion, the treadle is instantly drawn upward by the tension of two spiral springs, one near each end of the treadle board, attached to the

board at one end and extending upward to and hooked into the framework of the machine. The purpose of these springs when not overcome by pressure is to disengage the friction cone and instantly throw on the internal expanding brake, with the result that the beam of the machine, when in normal operation, is caused to stand approximately at the point of location when the brake is applied, except when within from one fourth to one half of an inch of the bottom. This beam weighs about 700 pounds. The foregoing operation of the machine has reference to a perfect machine in perfect order as it is intended to operate.

Plaintiff was thirty years of age and was injured by the beam descending upon his hands while engaged in his work in taking linings from under the beam which had been partially cut through by the die,—on one side of the block being cut through and on the other side not.

The evidence tends to prove that plaintiff was a man of less than ordinary intelligence; could speak but very little English; could not read or write in any language; was not familiar with machinery; first objected to working on the machine in question, but finally consented to do so; the foreman showed him in a general way how to operate the machine by placing the die upon the material, pressing the treadle, and removing the material; the foreman placed his own hands under the beam in showing plaintiff how to operate the machine; no warning of danger was given; the unevenness of the block left the linings uncut on one side at times and this made the work more difficult; plaintiff was not instructed to use a stick in removing the linings, though one was used customarily and was safer; he knew little or nothing about the machine or its operation; he handled the die generally in the same manner as when injured and was not instructed to the contrary; he did not know that the beam would descend without pressure upon the treadle; he operated the machine only a short time before the injury, but during that time the beam

did not descend when he took his foot from the treadle until the time of the accident, at which time the beam was standing from one to one and one-sixteenth of an inch above the top of the die, and while he was putting his fingers under the side of the linings to take out the cut parts, the beam descended without any pressure upon the treadle; that he had to press the treadle to raise the beam in order to get his hand out; at the time of the accident, due to the unevenness of the face of the block, there were three or four pairs of lining uncut on the left side of the die; immediately after the accident plaintiff exclaimed, "The iron fell and caught my hands; the machine must be out of order."

Several witnesses testified that the beam had slipped down many times before the plaintiff's injury, as the result of unexpected and abnormal action, and that defendant's superintendent knew it, and that the machine operated in the same irregular and abnormal way after the accident. The witnesses testified that some days the beam slipped down when it was not stopped at the highest point, sometimes slipped down slowly, sometimes fast, without the foot being upon the treadle. One witness testified that he saw it descend several times and informed the superintendent of the fact and finally quit work because of the danger. Defendant's superintendent testified that when the beam was within a quarter of an inch of the die it would come down to the top of the die without pressure upon the treadle. There is evidence that the first man who worked on the machine after the accident ran it a week. The first day it ran all right; the second day the beam came down without pressure upon the treadle.

Various reasons were given by witnesses for the irregular motions of the beam. Some testified that it was caused at times by defect in the brake, at other times by defect in the springs, too much oil on the expanding brake, binding of the clutch pulley to the shaft, looseness of the brake mechanism or mechanism connected with the brake, or because of improper

erection, or obstruction under the lever and block. These causes were given by experts as well as witnesses who operated the machine. Experts also testified to other defects in the mechanism and construction of the machine, operation of it and failure to keep in repair, which would cause the irregular motions of the beam. There is much conflict in the evidence, not only between operators, but experts as well.

The complaint was amended by adding the allegation that the defendant permitted the machine to be operated with a worn, old, loose, and insufficient brake, in such defective condition that the same would not prevent the iron beam from continuing in its downward course after the said beam had been lowered and raised by means of pressure upon the treadle and after pressure had been removed, so that the iron beam would make abnormal and irregular motions.

It is claimed by appellant that this is the only defect which caused the so-called irregular and abnormal motions, and that there is no evidence to support the allegation. This is untenable on two grounds: (1) there is sufficient evidence to warrant the jury in finding that the insufficiency of the brake might cause such irregular and abnormal motions; and (2) under a fair construction of the pleading as amended, the irregular and abnormal motions were chargeable, under the allegations of the complaint, to all defects alleged, as will be seen by an examination of this part of the amended complaint set out in the statement of the case.

The principal contention is that a nonsuit or directed verdict should have been granted, and it is first argued that the plaintiff was guilty of contributory negligence as a matter of law in failing to observe instructions. That the plaintiff was a person of low intelligence is well supported by the evidence. It appears on the defendant's own testimony that he was rather stupid and could not understand the superintendent's instructions. True, there is evidence that he was warned, but the warning was confined to ordinary use—the placing of the

die, cutting and removal of the cloth. There is evidence that he did not fully, if at all, understand the operation of removing the cloth when partially cut. It is also argued that it does not appear from the plaintiff's evidence whether the beam was moving or standing still when plaintiff placed his hands under it. Counsel is mistaken upon this proposition. An examination of the record will show that the evidence is ample to support the conclusion that the beam was standing still and some distance above the die immediately before it dropped and injured plaintiff. Upon the evidence we think the question of contributory negligence was for the jury. *Rahles v. J. Thompson & Sons Mfg. Co.* 137 Wis. 506, 118 N. W. 350, 119 N. W. 289; *Wolski v. Knapp-Stout & Co. Co.* 90 Wis 178, 63 N. W. 87; *Ruck v. Milwaukee B. Co.* 144 Wis. 404, 129 N. W. 414; *Jones v. Florence M. Co.* 66 Wis. 268, 28 N. W. 207; *Thompson v. Edward P. Allis Co.* 89 Wis. 523, 62 N. W. 527.

It is further insisted by appellant's counsel that there is not sufficient evidence that the machine was defective or performed abnormal and irregular motions. Many witnesses testified that the machine did at times act irregularly and make abnormal motions, both before and after the injury, and that this was known to defendant's superintendent. But it is said by counsel that the testimony of witnesses respecting the abnormal movements of the beam will not be permitted to overcome the conclusive proof of mechanical impossibilities. This assertion, of course, presupposes conclusive proof of mechanical impossibilities. In the instant case there is no such proof. Upon this point counsel relies upon *Samulski v. Menasha P. Co.* 147 Wis. 285, 133 N. W. 142; *Chybowski v. Bucyrus Co.* 127 Wis. 332, 106 N. W. 833; *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, 71 N. W. 434, and other similar cases, and quotes from *Samulski v. Menasha P. Co., supra:* "An uncontrovertible found, or conceded fact, or matter existing beyond all reasonable controversy, manifestly,

can successfully challenge testimony to the contrary from the mouth of a witness, or number of them."

If it were established in the case before us, or a conceded fact, that the machine in question could not have made the irregular and abnormal movements claimed by plaintiff, the authorities cited by appellant would be controlling. But such is not the case. As we have before shown, there is an abundance of evidence to support the finding of the jury that the beam did slip down at times after pressure had been removed from the treadle, and there is also abundance of evidence that it could have so operated. The evidence of numerous witnesses shown to be in position to know and having special knowledge upon the subject cannot be disregarded where there is room, as in this case, for the jury to find that their testimony was true. *Fleming v. Northern T. P. Mill,* 135 Wis. 157, 114 N. W. 841. The question litigated and found by the jury was whether the machine, prior to the injury, was liable to get in such condition that when used the beam at times would come down to the die without any pressure being applied to the treadle. This was clearly a jury question upon the evidence.

Quite a vigorous attack is made by counsel upon the credibility of witnesses, but an examination of the whole evidence convinces us that their credibility was clearly a jury question. The cases relied upon all turn upon the established fact that under the evidence it was a physical impossibility that the thing could have happened as found by the jury, or that under the evidence the finding rested for its support upon mere guessing or conjecture without any reasonable probability in its favor. But in these cases this court recognizes the rule that "The jury may go upon excursions of discovery for truth within the field of evidence to the uttermost boundaries of reason, not boundaries set by any particular persons, or persons generally, but such as rational men of common sense might set without passing beyond the dividing line between the field

of probabilities into that of mere guessing or conjecture." *Samulski v. Menasha P. Co., supra.* And in the above case it is said verdicts must rest upon probabilities, not upon bare possibilities. The case of *Fleming v. Northern T. P. Mill, supra,* is quite similar in its facts to the instant case, and we think is controlling here. In that case the machine was operated, as in this case, by a lever. Six credible witnesses testified that they had worked at the cutter machine before appellant was injured, and that occasionally the knife made a second downward movement with one pressure of the lever. Some of the witnesses testified that at times the knife would make more than a second such movement; others testified that upon the machine so operating some adjustment was made and it then ran all right; and still others testified that after making one second downward movement it was liable to run regularly as before without any readjustment. The same argument was made there as here, namely, that it was a mechanical impossibility that such abnormal movements could have been made, but the court overruled the contention, and it was held that ordinarily it is a question for the jury whether abnormal and dangerous movements of the machine have occurred with sufficient frequency to constitute notice to the employer of imperfections in the action. In the case at bar there is evidence of actual notice to the employer, before the injury, of the irregular and abnormal motions of the machine. The evidence in the case at bar is very lengthy and conflicting and no useful purpose would be served by an extended discussion of it. It is sufficient to say that we regard it ample to support the findings of the jury to the effect that the machine, prior to plaintiff's injury, was liable to get in such condition that while being operated the beam at times would come down to the die without any pressure being applied to the treadle; that defendant had knowledge of such fact and failed to warn plaintiff against the danger; that defendant was guilty of want of ordinary care in not warning

plaintiff, which was the proximate cause of the injury; and that plaintiff was not guilty of any want of ordinary care which contributed proximately to produce the injury. This case does not come within the rule of *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, 71 N. W. 434, and other cases of that character, where it was held that the mechanism of the machine was such as to render abnormal movements impossible, although there was testimony that the machine made an unexpected movement which it could not have made if properly adjusted and in a proper state of repair, in the face of a clear case that the machine uniformly, before and after the alleged unexpected movement, without anything having been done to change it in any way, ran all right, and there was no discoverable defect in it. The machine in question here, as in the *Fleming Case,* was quite complicated, and in order to work properly required very accurate adjustment of its parts. This appears fully from the testimony of experts, by which it is shown that loose springs, loose treadle, loose set-screws, and lack of other adjustment which the evidence shows at times existed, or even a half turn of one set of nuts, or a blocking of the lever, would cause irregular operation. Moreover, the jury saw the machine and were thereby greatly aided in weighing the testimony of the numerous witnesses and passing upon their credibility.

Error is assigned because the court refused to instruct the jury:

"In respect to question number 2 you are instructed that there is no evidence in this case proving or tending to prove that at any time when an examination of the die-press machine has been made has any defect or want of repair been discovered which might have caused the beam to descend without pressure being applied to the treadle, after the beam had come to a stop by the operator removing his foot from the treadle, but, on the contrary, every examination and every test made of the machine has shown it to be then in such condition that the beam, having come to stop by removal of the operator's

foot from the treadle, would not descend without pressure being again applied to the treadle."

There was no error in refusal to give this instruction. It was too narrow, its purpose being to give too much prominence to alleged tests of the machine when not in actual use. Moreover, it assumed facts as established upon which the testimony is conflicting.

Error is assigned in refusal to submit to the jury defendant's proposed questions 4, 5, and 6. The fourth question in substance inquires whether the defendant's officers knew that on numerous occasions prior to the injury, in the operation of the machine, after the beam had been brought to a full stop at a point from one and one-half to two inches above the die by removal of the foot from the treadle, it started in motion without pressure on the treadle; the fifth question inquired whether the defendant's officers ought to have known; and the sixth, whether the plaintiff received his injury by reason of the beam so coming down. There was no error in refusing to submit these questions, as they confined the jury to matters which were evidentiary, and did not fairly submit the ultimate fact under the evidence. The propositions requested to be submitted, in so far as they related to the ultimate issuable facts in the case, were covered by other questions and answers in the special verdict.

Error is assigned on the refusal to submit the thirteenth question requested by appellant. This is substantially the same as a question submitted in the *Fleming Case,* and by it the jury were asked,

"Was the cause of the beam slipping or falling down upon the die

"(a) A worn, old, loose, insufficient, or defective brake?

"(b) Uncovered and unguarded friction cone, pulleys, or clutch collar?

"(c) Treadle springs that were loose, strained, defective, or out of repair?

"(d) Failure to properly oil or clean machine?"

In the *Fleming Case* the jury did not answer categorically a similar question, but found that some one or more of the causes separately stated in the question caused the knife to come down a second time with one pressure of the lever.

It is true that these different defects were set out in the complaint as causes for the irregular and abnormal movements of the machine, but they were in fact evidentiary of the ultimate question which was litigated upon the trial, namely, whether the machine had a habit, or whether the beam occasionally fell. So we are of opinion that there was no prejudicial error in refusing to submit this question. We find no prejudicial error in the record.

By the Court.—The judgment of the court below is affirmed.

AMERICAN CASE & REGISTER COMPANY, Appellant, vs. WETZLER, Respondent.

January 9—January 30, 1912.

Sales: Acceptance of order: Revocation: Burden of proof.

1. The burden of proof to show that an order for goods was revoked before its acceptance is upon the party alleging such revocation.
2. The evidence in this case is *held* not to show that defendant revoked an order for goods before its acceptance by the plaintiff.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

For the appellant the cause was submitted on the brief of *Flanders, Bottum, Fawsett & Bottum.*

Leon B. Lamfrom, for the respondent.

TIMLIN, J. In the civil court for Milwaukee county a judgment was given against the defendant for $90 and inter-

est due on a promissory note. The complaint was appropriate to an action on a note, and the defendant answered setting up that the note was made with and was part of a contract dated July 22, 1909, by the terms of which it appears that defendant ordered plaintiff to make and ship f. o. b. Salem, Ohio, on or before September 21, 1909, or as soon thereafter as practicable, an article of property called "Physicians' Account Register and Case Recorder." This was to be paid for $10 with the order and balance of $90 by said note. There were many other stipulations contained in this contract, but it is only necessary to note that it contained a provision as follows:

"Taken subject to acceptance by the *American Case & Register Company* at home office. If not accepted, any money collected herein, together with any note executed, are to be returned to purchaser."

It was averred that this contract was procured by fraudulent representations, and that the defendant revoked the offer before its acceptance by plaintiff, and there was a counterclaim for the $10 based upon rescission of the contract. The plaintiff offered the note with computation and rested. The defendant offered his own evidence and that of Dr. Oakland and one letter in support of his affirmative defense. The evidence is very meager. Upon appeal the circuit court, on the evidence returned, reversed this judgment and gave judgment for the defendant for $10 and costs. From an oral opinion delivered by the circuit judge it appears this ruling was based upon his belief that the written offer was revoked by defendant before its acceptance by plaintiff.

No actionable fraud is shown by the evidence. Assuming that defendant had the right of rescission at his pleasure at any time before acceptance by the plaintiff, which is as favorable as defendant can expect, is there sufficient evidence to establish a revocation by defendant before acceptance of the offer by plaintiff? Taking all the evidence together, it ap-

pears that defendant received from plaintiff a letter dated August 20, 1909, in answer to one of his of August 18, 1909, assuring him that his order would receive the best of attention. It also appears that the plaintiff retained the $10 and the note and that it must have delivered the article to the railroad for shipment, because the article arrived at Milwaukee and defendant was so notified by the carrier. We have no means of ascertaining when it was shipped or when it arrived at Milwaukee. The only evidence of rescission prior to acceptance is defendant's statement that the next thing he did, after finding out that he was not given the same terms as Dr. Oakland, was to cancel the order. He did this by letter, but does not give the contents of the letter nor the time when the letter was sent. He does say that after several of his letters he received a card from the railroad company notifying him that the cabinet had arrived, and he thereupon refused to accept it.

"*Q.* Did you communicate with him once, or did you communicate only once that you refused to accept the cabinet? Objected to, and objection overruled. *A.* I think I communicated once with their attorneys at Youngstown, Ohio. I think that's the place, I am not sure."

The plaintiff moved to strike out that part of the evidence relating to letters written as not the best evidence, but there was no ruling made on this motion.

It is not necessary to search afar for rules or principles determinative of this simple case. The execution and delivery of the contract, the note, and payment of the $10 was each a step in the making of a contract to be closed by the remaining step, namely, the assent of the plaintiff. Until such assent no contract was consummated and the defendant had a right to withdraw his offer, there being no other consideration given for the offer and no provision that it should remain outstanding for a definite or fixed time. But the unavoidable inference from the letter of August 20th, from the retention of the note and the $10, and from the shipment of the cabinet,

is that the plaintiff accepted the offer. When it accepted the offer is not shown; neither is it shown when the defendant revoked the offer, assuming defendant's evidence of revocation to be competent. The burden of proof was upon the defendant to show revocation of his order prior to acceptance. This the evidence fails to do. It follows that the judgment of the circuit court must be reversed, and the cause remanded with directions to affirm the judgment of the civil court.

By the Court.—Judgment reversed, and cause remanded with directions as stated in the opinion.

STATE EX REL. BESSIE VS. HALSEY, Circuit Judge.

January 9—January 30, 1912.

Change of venue: Demand: Sufficiency.

Where, under subd. 6, sec. 2619, Stats. (1898), the county in which the sole defendant resided was the only proper place of trial of an action, a demand by him that the trial be had within said county, naming it, "for the reason that the said defendant, at the time of the commencement of the action and for many months prior thereto, resided and still resides in such county," was sufficient under sec. 2621, although it did not in terms state that said county was "the proper county." *Anderson v. Arpin H. L. Co.* 131 Wis. 34, distinguished.

MANDAMUS to the Judge of Branch No. 1 of the circuit court for Milwaukee county. *Peremptory writ awarded.*

The cause was submitted for the relator on the brief of *Husting & Husting,* and for the respondent on that of *Glicksman, Gold & Corrigan.*

PER CURIAM. Within twenty days after the service of a summons and complaint in an action for slander and libel the

defendant served upon the plaintiff's attorneys a demand for a change of the place of trial of said action to Winnebago county, "for the reason that the said defendant, at the time of the commencement of said action and for many years prior thereto, resided and still resides in said county of Winnebago." There was no consent to the change. The defendant moved for an order changing the place of trial and the court denied the motion, apparently upon the authority of *Anderson v. Arpin H. L. Co.* 131 Wis. 34, 110 N. W. 788. The cases are, however, distinguishable. In the *Anderson Case* there were two counties to either of which the defendant was entitled by statute to remove the cause for trial. The instant case is of such a nature that the statute gives the defendant the right to remove it to only one county, namely, Winnebago county, named in the demand. Under the facts in the instant case Winnebago county is by statute the proper county, and it would be quite a technicality to hold that the movant must ratify the statute by again declaring in his demand what the statute has already declared. The demand must be held sufficient. The circuit judge will therefore vacate his order denying the motion to change the place of trial and enter an order granting said motion as provided by statute. A peremptory writ of *mandamus* is awarded to that effect against the respondent, but without costs.

MILWAUKEE MIRROR & ART GLASS WORKS, Respondent, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant.

January 10—January 30, 1912.

Railroads: Storage of baggage: Bailment: Gratuitous or for hire? Liability for loss: Negligence: Evidence: Burden of proof: Appeal: Bill of exceptions: Presumptions in support of judgment.

1. A railway company accepted from one R., a passenger on an incoming train, a sample case for storage in the baggage room, giving him a claim check therefor. In the room was posted a schedule of storage charges for "baggage, either inbound or outbound, checked or not checked," and R. testified that he stored the sample case pursuant to the terms thereof. A week later he sent for it, tendering the claim check and the amount of charges according to the schedule, but it could not be found. *Held*, that if the sample case was baggage there was a bailment for hire. If the company did not intend to avail itself of the right to charge according to the schedule it should have so informed R. when he offered the case for storage.
2. Although it did not come from, and was not destined to, a baggage car, a sample case accepted from a passenger for storage in a baggage room is "baggage" within the meaning of a notice posted in such room, stating that "storage will be charged on each piece of baggage, either inbound or outbound, checked or not checked, remaining at station over twenty-four hours," etc.
3. By accepting without objection a sample case for storage in the baggage room, a railway company is precluded from claiming that it should have been checked at the news stand, although there was a posted notice reading, "Parcels and hand baggage checked at news stand."
4. Where goods are stored with a common carrier or warehouseman and there is a failure to deliver upon proper demand, the owner need not show specific acts of negligence to make a *prima facie* case entitling him to recover, the burden being on the carrier or warehouseman to show that the failure to deliver did not result from any negligence on his part.
5. Where a bailee for hire is unable to show how goods were lost, a presumption of negligence arises sufficient to entitle the bailor to recover.

6. Upon appeal from a judgment based on a general verdict for plaintiff, where the charge to the jury is not preserved in a bill of exceptions, it will be presumed that controverted issues upon which the right to recover depended were determined in plaintiff's favor by the jury under proper instructions.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Affirmed.*

Carl Reiman, an employee of plaintiff, was a passenger on the defendant road from Arena to Milwaukee, carrying with him in the passenger coach a sample case belonging to plaintiff which contained patterns and designs used in its business in soliciting orders. The case was twenty-six inches long, seventeen inches wide, five inches high, weighed about forty pounds, and contained, in part, valuable breakable patterns, and was for that reason not checked in the baggage car. When Reiman arrived at the Union Depot in Milwaukee, not knowing whether the case would be needed at plaintiff's place of business before he went out on another trip, he took it to the baggage room, asked to have it stored, and received a claim check. At the time he stored it defendant had posted in the baggage room a notice, the sixth paragraph of which read as follows:

"Storage will be charged on each piece of baggage, either inbound or outbound, checked or not checked, remaining at station over twenty-four hours, as follows: The first twenty-four hours free. The second twenty-four hours, or fraction thereof, twenty-five cents. For each succeeding twenty-four hours or fraction thereof, ten cents."

Reiman was well aware of the contents of this notice, and testified he stored the sample case pursuant to the terms thereof. A week later he sent for it, tendered the claim check and the correct amount of storage charges as per terms of the notice, but it could not be found. This action was brought to recover the value of the sample case and contents. The jury found for the plaintiff, and from a judgment entered on the verdict in its favor the defendant appealed.

For the appellant there was a brief by *C. H. Van Alstine, H. J. Killilea,* and *Rodger M. Trump,* and oral argument by *Mr. Trump.*

M. C. Krause, for the respondent.

VINJE, J. The defendant claims the bailment was a gratuitous one and, since no gross negligence was shown on its part, plaintiff was not entitled to recover. Reliance is placed upon the case of *Minor v. C. & N. W. R. Co.* 19 Wis. 40, to sustain this position. There, a passenger at the end of the journey handed her valise to the baggageman with the request that he keep it for her a few hours till she sent for it, and the court very properly held that the evidence showed beyond all question a gratuitous bailment. There was no evidence that the defendant stored baggage for hire, or that the plaintiff so understood, or that she expected to pay for the bailment. Both parties unquestionably understood at the time the request was made that there would be no charge for the service rendered. In the instant case, however, the defendant, by the posted notice, held itself out as a bailee for hire of baggage and announced the terms of such bailment. The plaintiff's employee knew of such holding out, and delivered the case to it relying upon the fact that the terms of the bailment were fixed by the notice. Under the terms thereof the defendant had a right to charge, and if it did not intend to avail itself of such right it was its duty to so inform Reiman at the time he offered the case for storage. *Dimmick v. M. & St. P. R. Co.* 18 Wis. 471. The latter case rules the present one so far as the effect of the posted notice is concerned, assuming the sample case in question to be baggage within the meaning of paragraph 6 thereof. In the *Dimmick Case* the court held that a request to keep goods for a short time would be considered a request to keep them pursuant to the terms of a posted notice of the defendant even though the plaintiff did not know of such notice, unless an agreement to store free for the whole

time was made. That case goes further than it is necessary to go in the present case to hold the bailment one of hire, for here the uncontradicted evidence is that Reiman expected to pay, and did tender, the charges prescribed in the notice.

Defendant further claims that it was not the custom to charge for such storage as was given plaintiff's sample case. But upon this question the evidence is conflicting, Reiman testifying that he had previously paid for similar storage, while defendant's general baggage agent said no charge was ever made for storage of inbound baggage, unless it was checked out again; that is, unless it was actually checked and sent out on a baggage car. In other words, it was the custom to make no charge for storage unless the baggage actually came in or went out on a baggage car. Were plaintiff's right to recover dependent upon proving that he had paid for similar storage, we must assume the jury found in its favor upon the question under proper instructions, in the absence from the bill of exceptions of the charge to the jury. *Casper v. State,* 47 Wis. 535, 2 N. W. 1117.

Was the sample case baggage within the meaning of the notice? It says, "Storage will be charged on each piece of baggage, either inbound or outbound, checked or not checked, remaining at station over twenty-four hours." The defendant contends that the notice applies only to baggage coming from, or destined to, a baggage car, and does not apply to baggage in the possession of a passenger at the end of his destination and left for storage till called for, unless it is rechecked and sent to a baggage car. There is nothing in the notice requiring or even suggesting such a narrow construction. The words are, "baggage, either inbound or outbound, checked or not checked." An ordinary person reading the notice would, we think, utterly fail to detect any gratuitous bailment possible under it, much less provided by it, except for the first twenty-four hours. The language is general, and it is evident

the words of the notice apply as well to baggage that has not been in a baggage car, or is not intended for one, as to that which has or is. There is no claim that the sample case was not baggage on the ground that it contained patterns and designs and was not such personal effects of a passenger as may be necessary for his journey. So we must consider it as ordinary baggage.

Defendant also had a notice posted reading, "Parcels and hand baggage checked at news stand opposite ticket office," and it insists that it was Reiman's duty to take the sample case to the news stand and have it checked there. The time to suggest that duty was when it was tendered for storage at the baggage room, and not after it had been accepted and lost. The fact that the defendant maintained two places for the storage of baggage providing for slightly different rates left it optional with plaintiff to select either one. This must certainly be held to be so in the absence of any objection by the defendant that the right place was not selected when he tendered the sample case for storage. By accepting it for storage in the baggage room the defendant is foreclosed from claiming that it should have been taken to the parcel room.

There is no evidence of any gross negligence, and the evidence of ordinary negligence is meager. However, where goods are stored with a common carrier or warehouseman and there is a failure to deliver upon proper demand, the owner need not show specific acts of negligence to make a *prima facie* case entitling him to recover. To escape liability the burden is cast upon the defendant to show that the failure to deliver did not result through any negligence on its part. *Terry v. Southern R. Co.* 81 S. C. 279, 62 S. E. 249, 18 L. R. A. N. S. 295 and note; Van Zile, Bailm. & Carr. (2d ed.) § 204. See, also, *Hildebrand v. Carroll,* 106 Wis. 324, 82 N. W. 145. Defendant was unable to give any explanation of how the loss occurred. Under such circumstances a presumption of neg-

ligence arises sufficient to entitle plaintiff to recover. *Browning v. Goodrich Transp. Co.* 78 Wis. 391, 47 N. W. 428; *Geo. C. Bagley E. Co. v. Am. Exp. Co.* 63 Minn. 142, 65 N. W. 264.

By the Court.—Judgment affirmed.

WOLFF, Appellant, vs. CARSTENS and another, Respondents.

January 11—January 30, 1912.

Trial: Reception of evidence: Instructions to jury: Argumentative charge: Invading province of jury: Special verdict: Form: Omission of essential fact: Appeal: Harmless errors.

1. Evidence may be of such slight weight and importance that its admission, though erroneous, is not ground for reversal.
2. An extended and argumentative charge to the jury, invading the jury's function of determining the weight, probative effect, and sufficiency of the evidence, is *held* to have been erroneous, but not in this case to have affected the substantial rights of the appellant.
3. In an action to recover for loss sustained in the purchase of a share of corporate stock alleged to have been induced by defendants' fraudulent representations, the special verdict negatived any conspiracy on the part of defendants and contained no finding that plaintiff relied on any of the representations made by them and was thereby induced to purchase the stock. Plaintiff made no request for a finding on that point. *Held*, that on appeal from a judgment against the plaintiff it must, under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), be deemed that the trial court determined that fact against him.
4. Questions submitted for special verdict should not be separated into subsidiary inquiries as to mere evidentiary matters. Only special questions covering the issues made by the pleadings and controverted on the evidence, each so framed as to cover a single issue and admit of a direct answer, should be included.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The complaint alleges that the plaintiff purchased one share

of stock in the Manitowoc County Co-Operative Company, that he was induced to make the purchase upon the fraudulent representations of the defendants, and that if the representations had been true the share of stock would have been worth $300. It is alleged that the stock is without value. Judgment is demanded for the sum which would have been the value of the share if the representations made by the defendants had been true.

The Manitowoc County Co-Operative Company (hereafter called the company) was organized to conduct a mercantile and other business upon the co-operative plan. Its articles of incorporation were filed in the office of the secretary of state on the 15th of June, 1904, and recorded with the register of deeds for Manitowoc county on the 18th of that month. The capital stock was $50,000, divided into 500 shares of $100 each. Fifty per cent. of the capital stock was never subscribed for, nor was twenty per cent. ever paid in.

The defendant *Carstens* had been engaged in a mercantile business for about twenty-five years. He was interviewed by the promoters of the company and solicited to turn over his store to the company. To this he finally consented and transferred his stock of goods to the company. He was made manager, and was in charge of the business until it was turned over to a receiver in July, 1907. At this time the assets of the company were $16,145.44.

The plaintiff testified that before his purchase of his share of stock both of the defendants had stated and falsely represented to him that the company was doing a good paying business; had paid eight per cent. dividends and was going to declare another dividend; that it was incorporated under the mutual co-operative laws of the state and authorized to do business; that they were going to increase the business by establishing branch stores and by taking up other lines of business as they got new stockholders; that they had a paid-up stock of goods worth $10,000 or $12,000; and that he relied

upon and was induced to make this purchase of stock by these representations.

The defendants testified that they had talked with the plaintiff about becoming a member of the company, but denied having made any false statements to him.

Plaintiff further testified that he had signed the subscription list; that he had received a certificate of stock numbered 54 and dated June 12, 1905; and that he paid the money for the share of stock to the defendant *Carstens*.

The court submitted a long verdict to the jury and instructed them most elaborately and at length in connection with it. In the instructions submitted in connection with the special questions the court stated the evidence as he recollected it, gave the inferences which might be drawn from the evidence, and presented by way of argument the reasons that should have weight in passing judgment on the evidence adduced by the parties to support their respective contentions. To illustrate: Upon one of the sub-questions of the first question, propounding the inquiry as to whether the defendants had represented to the plaintiff that the corporation owned a stock of merchandise worth $10,000 or $12,000 fully paid for, the instructions stated the facts regarding the inventory of *Mr. Carstens'* stock, that the stock could be paid for only out of the funds of the company, submitted that since only fifty-four shares of stock had been issued it was manifest that the amount represented thereby would not be sufficient to pay for a stock of goods worth $10,000 or $12,000, and pointed out that if *Carstens* represented to the plaintiff that the company had a stock of goods worth $10,000 or $12,000 he must have known that it was not fully paid for. Bearing upon the question of whether the defendants had made the representations claimed, the court stated to the jury that they might properly consider, as bearing on this question, that the defendants had lived in the community for many years, had conducted businesses there, and must have known that the plaintiff, if he became a stockholder in the company, would learn the facts

regarding the value of the stock of goods held by the company and what had been paid for it. He also stated in connection with this same question that the jury might consider the bearing of the plaintiff upon the stand, his intelligence and capacity, and whether, in view of the fact that the plaintiff's share of stock was numbered 54 and of the fact that each share was worth $100, the defendants could have caused him to believe that a stock of goods of the value of $10,000 or $12,000 had been bought by the company theretofore and had been fully paid for by the company. The instructions upon the other issues submitted were likewise elaborated and as extensive in their scope and treatment of the evidentiary facts bearing on those issues.

The jury returned the following verdict:

"(1) At or before the time when plaintiff paid for his stock in the Manitowoc County Co-Operative Company, an alleged corporation, did said defendants, or either of them, represent to plaintiff:

"(a) That at least one half of the capital stock of said corporation had been fully subscribed and at least twenty per centum thereof had been actually paid in? *A.* As to *Carstens,* No. As to *Lehmkuhl,* No.

"(b) That said corporation then owned a stock of merchandise of the value of $10,000 or $12,000, which had been fully paid for? *A.* As to *Carstens,* Yes. As to *Lehmkuhl,* No.

"(c) That the shares of stock of said corporation were then worth their par value? *A.* As to *Carstens,* Yes. As to *Lehmkuhl,* Yes.

"(d) That said corporation had theretofore paid a dividend of eight per cent. from its net earnings? *A.* As to *Carstens,* No. As to *Lehmkuhl,* No.

"(e) That said corporation was organized upon the mutual or co-operative plan as set forth in sec. 1786*e* of the Wisconsin Statutes of 1898? *A.* As to *Carstens,* No. As to *Lehmkuhl,* No.

"(f) That said corporation was then doing a profitable business? *A.* As to *Carstens,* Yes. As to *Lehmkuhl,* Yes.

"If you answer 'No' to each and all of the foregoing ques-

tions, then do not answer any of the following questions excepting the tenth.

"(2) If as to any one or more of the subdivisions of the first question you answer 'Yes,' then answer this: Were any of the representations, which your answer of the first question finds to have been so made to plaintiff, substantially false at the time when they were so made to him? *A.* Yes.

"(3) If your answer to the second question be 'Yes,' then answer this: Which, if any, of said false representations were so made with knowledge of their falsity (a) by defendant *Carstens* and (b) by defendant *Lehmkuhl?* *A.* (a) By *Carstens,* the representations specified in subdivision 'b' of the first question. (b) By *Lehmkuhl,* the representations specified in subdivision —— of the first question.

"(4) If by your answers to the third question you find that each or either of the defendants knowingly made said false representations to plaintiff, then answer this: At the time when said false representations were so made to plaintiff, was there existing between said defendants, *Carstens* and *Lehmkuhl,* an unlawful conspiracy, the object and purpose of which was to effect, by means of said false representations, the sale of certificates of stock of said corporation, in order to thereby obtain money for said corporation, or for said defendants, or for both said corporation and said defendants? *A.* No.

"(5) If your answer to the fourth question be 'Yes,' then answer this: Were said false representations or any thereof made to plaintiff by defendants, or either of them, for the purpose of carrying out said conspiracy? *A.* ——.

"(6) If your answer to the fifth question be 'Yes,' then answer this: Did plaintiff so far rely on the truth of any said false representations made for the purpose stated in the fifth question, that he was thereby induced to purchase the certificate of stock of said corporation which was issued to him? *A.* ——.

"(7) If your answer to the sixth question be 'Yes,' then answer this: In so relying on the truth of the representations specified in the sixth question, did plaintiff fail to exercise ordinary care to ascertain whether the same were true or false? *A.* ——.

"(8) If your answer to the seventh question be 'Yes,' then answer this: Would the exercise of ordinary care on plaintiff's

part before he paid for said stock certificate have disclosed to him the falsity of any of the representations specified in the sixth question? *A.* ——.

"(9) If your answer to the eighth question be 'Yes,' then answer this: Specify the representations whose falsity plaintiff would have discovered before he paid for said stock, if he had exercised ordinary care to make such discovery. *A.* The representations specified in subdivisions —— of the first question.

"(10) At the date when he paid therefor, what was the reasonable value of the share of stock purchased by plaintiff? *A.* $100.

"(11) If your answer to the second question be 'Yes,' then answer this: What would have been the reasonable value of said share at the date when plaintiff paid therefor, if the representations which your answers to the first question find to have been made, had all been substantially true? *A.* $125."

The plaintiff moved that the verdict be changed, that he be awarded judgment notwithstanding the verdict, and that he be granted a new trial. The court denied each of the motions of the plaintiff, and also a motion of the defendants to have the verdict changed, and ordered judgment dismissing the complaint upon the merits and allowing the defendants costs. This is an appeal from the judgment so awarded.

E. S. Schmitz and *F. F. Groelle,* for the appellant.

For the respondent *Carstens* there was a brief by *Healy & Joyce,* and oral argument by *John J. Healy.*

Isaac Craite, for the respondent *Lehmkuhl.*

SIEBECKER, J. The first exception urged pertains to the reception in evidence of statements made by Healy concerning a portion of the inventory of the stock of the co-operative enterprise without the written proofs being produced, and of *Lehmkuhl's* evidence of a reported statement of an employee to the effect that *Lehmkuhl's* presence at the session of the auditing committee was not desired by them. These statements are of such slight weight and importance that they can-

not be deemed to have been of consequence in the jury's deliberations on the case, and hence no substantial prejudice could result therefrom.

It is contended that the court erred in charging the jury and thereby prejudicially affected the appellant's rights, in that the court usurped the function of the jury by directing them what weight to give to evidence in the case, by resolving conflicts in the evidence, by directing the jury how such conflicts were to be decided, and by otherwise expressing opinions to the jury as to the credibility of witnesses and what evidence should be considered as controlling upon the issues, thus misleading the jury and usurping its functions. The charge covers twenty-nine pages of the printed case and its context shows that it is properly subject to criticism as being unnecessarily elaborate as to details, confusing in its effect, and in some of its parts as invading the province of the jury by communicating to them the court's opinion of the effect of the evidence on disputed issues of fact. Nor can we approve the charge in its treatment of the evidence by way of argumentation, which necessarily conveyed to the jury the court's personal view of the weight of the evidence, the credibility of witnesses, and the probative force of evidentiary facts. This practice has the inherent objection of tending to lead the court to invade the jury's function of determining the weight, probative effect, and sufficiency of the evidence, and what inferences of fact should be drawn from the evidence adduced. We cannot escape the conviction that the court in this case, in portions of its charge to the jury, invaded the functions of the jury in these respects. Nor can we approve the practice, in connection with a special verdict, of charging juries upon plain and clear issues of fact, such as are presented here, by such extended and argumentative instructions on the facts as was done upon this trial. Such practice fails to accomplish the object of directing the jury to the ultimate issues of fact for their determination, and is apt to confuse and mislead

them and thus operate prejudicially upon the rights of the parties. From a study of the record we cannot say that the verdict in this case should be disturbed on account of the court following this erroneous method of instructing the jury, for it does not appear that this error has affected the substantial rights of the appellant. An examination of the special verdict discloses that the jury negatived the charge that the defendants wilfully conspired to fraudulently sell plaintiff this stock for the benefit of the corporation, as charged in the complaint, and there is no finding that the plaintiff relied on any of the representations made by the defendants and was thereby induced to purchase the certificate of corporate stock here in question. The appellant raised no question of any insufficiency in this respect in the verdict rendered and made no special request for a finding thereon; hence it must be considered that the court under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), found the fact against appellant's contention. It must follow that the court properly awarded the defendants judgment upon the ground that the facts found do not establish that the defendants practiced the fraud alleged on the plaintiff, because it does not appear that the plaintiff relied on any fraudulent representations of the defendants and was thereby induced to purchase the certificate of stock.

The form of the special verdict submitted compels us to call attention to it. It will be observed that the court framed questions which were designed to cover ultimate issues of fact presented by the pleadings, and then subdivided such questions into subsidiary inquiries. This was carried to an extent that led to inquiries upon mere disputes in the evidence bearing on the ultimate issues of fact raised by the pleadings. Such a practice is not in accord with the correct and approved method of framing special verdicts under the statute. It tends to confusion and prevents juries from determining under the evidence the ultimate issues presented by the pleadings, and hence is not the correct method of framing special

verdicts under the calls of the statute. As stated in the headnote to *Mauch v. Hartford,* 112 Wis. 40, 87 N. W. 816:

"Only special questions, covering the issues made by the pleadings and controverted on the evidence, each so framed as to cover a single issue and admit of a direct answer, should be included in a special verdict."

By the Court.—Judgment affirmed.

SIXTA and another, Appellants, vs. ONTONAGON VALLEY LAND COMPANY, Respondent.

January 11—January 30, 1912.

Contracts: Consideration: Seal: Brokers: Selling land on commission: Option to purchase: Acceptance: Breach by owner: Damages: Pleading: Demurrer.

1. By written contract the defendant company gave plaintiffs the exclusive right, until January 1, 1911, to sell certain of its lands on commission, subject to the company's right to make sales of the land at not less than $10 per acre, and also gave plaintiffs the right and option, at any time before January 1, 1911, to purchase all unsold lands at the uniform price of $6 per acre. Plaintiffs were to bear all expenses of marketing and sale of the land, and in case they exercised their option to purchase were to be credited on the purchase price with any excess in cash or securities above $6 per acre received by defendant on previous sales, whether made by it or by plaintiffs. In an action upon the contract, a complaint alleging that plaintiffs duly performed on their part up to and after May 23, 1910, and had sold 1,380 acres, and intended to purchase all the unsold land under the terms of their option, but that on that date defendant violated the contract by selling all the remaining land at less than $10 per acre, thereby disabling itself from performing the agreement, and refused to deal further with plaintiffs thereunder, and made it impossible for plaintiffs to perform on their part, as they were able, ready, and willing to do, to their damage in the sum of $100,000, is *held,* on demurrer, to state a good cause of action.

2. Upon a general demurrer to a complaint the question as to just what damages are recoverable is unimportant, it being sufficient that a cause of action for some damages is stated.
3. The contract above stated is an entirety, including the option feature, and the covenants of each party constituted a consideration for the covenants of the other.
4. A contract under seal imports, presumptively at least, a sufficient consideration.
5. The allegations of the complaint above stated sufficiently show an acceptance of the option to purchase, in view of the fact that defendant refused to deal further with plaintiffs under the agreement.

APPEAL from an order of the circuit court for Manitowoc county: E. B. BELDEN, Judge. *Reversed.*

This action was brought upon the following contract, which is made part of the complaint:

"This agreement, made and concluded this 5th day of April, A. D. 1909, by and between the *Ontonagon Valley Land Company,* a Wisconsin corporation, herein called the 'Land Company,' party of the first part, and E. C. Sixta & Company, a copartnership composed of *E. C. Sixta* and *James G. Martin,* herein called 'Sixta,' party of the second part, witnesseth:

"1. The Land Company hereby gives to Sixta the exclusive authority and right to sell all of the lands of the Land Company particularly described in the schedule thereof hereunto attached and made a part hereof and marked 'Exhibit A,' for and until January 1, 1911.

"2. The price and prices at which such lands shall be sold shall be made from time to time by the Land Company upon application of Sixta, and the terms of each sale made by Sixta shall be subject to the approval of the Land Company.

"3. The Land Company agrees to pay Sixta, as commission for selling said lands, one dollar and fifty cents ($1.50) per acre.

"4. Sixta shall at his own expense advertise said lands for sale and continuously during the term of this agreement endeavor to sell said lands.

"5. All expenses in connection with the sale and marketing of said lands shall be borne by Sixta. All cash received from

the sale of said land after deducting the commission of Sixta shall be immediately turned over and delivered to the Land Company, and all securities taken upon sales shall be taken in the name of the Land Company.

"6. At any time prior to the expiration of this contract, to wit, January 1, 1911, Sixta is hereby given the right, privilege, and option of purchasing all of the lands described in said annexed list which shall remain unsold at the time of exercising the option hereby given, at the uniform price of six ($6) dollars per acre; and it is agreed by the Land Company that all money received by it, as well as the face value of all securities received by it upon sales theretofore made by Sixta, after deducting therefrom the sum of six ($6) dollars per acre for all such lands sold, shall be credited to Sixta and considered a payment upon the purchase price of the lands which Sixta shall elect to purchase.

"7. It is expressly understood and agreed, however, that this contract shall vest in Sixta no right, title, interest, claim, or demand of any character whatsoever in the real estate described in the annexed schedule, nor shall this contract be recorded in the register of deeds' office in any county where the lands described in the annexed list are located. But if Sixta shall elect to purchase pursuant to the option hereby given, then the Land Company shall execute to Sixta a contract of purchase which may be recorded. If Sixta shall elect to purchase, there shall be paid to the Land Company, at the time of such election, the sum of at least twenty thousand ($20,000) dollars, to be applied upon the purchase price to be paid for said lands, and the unpaid purchase money shall be payable in three equal annual instalments secured by mortgage of the land sold and bearing interest at the rate of five per cent. (5 %) per annum.

"8. It is further agreed and made an express provision of this contract that in any sale made by Sixta of the lands described in the annexed schedule, there shall be reserved to the Diamond Match Company, an Illinois corporation, one half (1-2) of all the mineral rights upon said real estate, and to the Land Company one fourth (1-4) of all such mineral rights, together with the right to each of them of entering upon said land and extracting the minerals and the right to the use of the waters thereof for such purpose.

"9. If Sixta shall exercise the option hereby given to purchase said real estate, in the conveyance thereof to him there shall be reserved to the Diamond Match Company one half (1-2) of all the mineral rights upon and in said real estate, and to the Land Company one eighth (1-8) of such mineral rights, together with the right to each of them to enter upon said real estate and mine for and extract such minerals and the right to the use of the waters on such real estate for said purpose.

"10. It is further expressly agreed that nothing in this contract shall limit or prevent said Land Company from making sales of said real estate at any time or to any person; but the Land Company agrees not to sell any such land for a less sum than ten ($10) dollars per acre. On sales made by the Land Company no commission shall be paid Sixta, but if he shall exercise the option hereby given him the Land Company agrees to credit Sixta upon such purchase all sums over and above six ($6) dollars per acre received by it upon sales made by itself.

"In witness whereof the parties of the second part have hereunto set their hands and seals the day and year above written, and the *Ontonagon Valley Land Company* has caused these presents to be signed in its corporate name by Julius Lindstedt, its president, and countersigned by Edwin G. Nash, its secretary, and its corporate seal to be hereto affixed, all by due and lawful authority of its board of directors.

THE ONTONAGON VALLEY LAND COMPANY,
By Julius Lindstedt, Its President.

In presence of
Alma E. Klingholz.
Nora Dicke.

Countersigned by
E. G. Nash, Its Secretary.

(Seal.)

E. C. SIXTA. (Seal.)
JAMES G. MARTIN. (Seal.)"

In addition to setting out the contract as the basis of the action the complaint alleges that the plaintiffs were engaged in the purchase and sale of lands and in the sale of lands on commission in Wisconsin and Michigan; that on the 5th day of April, 1909, at Manitowoc, the plaintiffs made the contract referred to; that the lands embraced in the contract were 17,340 acres; that immediately after the contract was made

the plaintiffs proceeded diligently to carry out its terms on their part to be performed, advertised the lands for sale, solicited persons to buy and sold 1,380 acres, and performed all the conditions on their part of said contract up to the 23d day of May, 1910, and continued performance for some time thereafter; that plaintiffs had prepared and were prepared to carry out all the provisions of said contract within the time and in the manner therein specified, and were prepared and intended to purchase all the lands as specified in paragraph 6 of said contract; that on May 23, 1910, without the knowledge of the plaintiff, the defendant, in violation of the terms of said contract, sold and conveyed to the W. J. Hess Company, a corporation, all of the lands not theretofore sold by plaintiffs for a sum less than $10 per acre, and the defendant by said sale, voluntarily and in disregard of the plaintiffs' rights under said contract, disabled itself from carrying out the terms thereof on its part, and thereafter and during the month of July, 1910, informed plaintiffs that it had so disabled itself and refused to further deal with plaintiffs under said contract, and thereby made it impossible for plaintiffs to carry out said agreement on their part, although they were able, ready, and willing so to do, to the plaintiffs' damage in the sum of $100,000.

The defendant demurred to the complaint for want of facts sufficient to constitute a cause of action. The court below sustained the demurrer, and from the order sustaining the demurrer this appeal was taken.

For the appellants there was a brief by *Hougen & Brady*, and oral argument by *A. L. Hougen.*

For the respondent there was a brief by *Nash & Nash*, and oral argument by *E. G. Nash.*

KERWIN, J. Under the contract which is the basis of plaintiffs' cause of action the plaintiffs had the exclusive right of sale of the lands of defendant until January 1, 1911, and

were to receive $1.50 per acre commission, subject to defendant's right to sell all or any part of the land at not less than $10 per acre, and plaintiffs were to receive no commission on land sold by defendant. Plaintiffs were further given the right, at any time prior to January 1, 1911, to purchase all the lands in question which should remain unsold at the time of exercising their option, at the uniform price of $6 per acre; and it was agreed by the terms of the contract that all money received by defendant, as well as the face value of all securities received by it upon sales theretofore made by plaintiffs, after deducting $6 per acre, should be credited to plaintiffs, to apply upon the purchase price of the lands which plaintiffs should elect to purchase. The defendant also agreed to credit plaintiffs, if they should elect to purchase, with all sums over and above $6 per acre received by defendant on sales made by it. All expenses in connection with sale and marketing of the land were by the contract to be borne by plaintiffs. The plaintiffs duly performed on their part up to and after May 23, 1910, and sold 1,380 acres, advertised the lands for sale and solicited persons to buy, and were prepared to carry out all the provisions of the agreement within the time and in the manner specified, and intended to purchase all the land specified in paragraph 6 of the agreement. The defendant violated the contract on May 23, 1910, by a sale of all lands not theretofore sold by plaintiffs for less than $10 per acre, and disabled itself from performing its agreement with plaintiffs and so informed plaintiffs, and refused to further deal with plaintiffs under the agreement, and made it impossible for plaintiffs to carry out the agreement on their part, although plaintiffs were able, ready, and willing so to do. It is alleged that plaintiffs sustained $100,000 damages.

The foregoing facts are admitted by the demurrer and constitute a good cause of action against the defendant. Just what damages may be recovered need not be considered and cannot well be until the evidence is in. It is sufficient that

the complaint states a cause of action for the recovery of some damages.

The main contention of respondent is that the writing sets out a selling agency and an option to purchase, and that the option was not binding until accepted, and that it was revoked or withdrawn before accepted, hence plaintiffs never acquired any rights under it. The so-called option feature of the contract cannot be separated from the commission part. Each is dependent upon the other: the covenants are mutual. The covenants of each party to the contract constitute a consideration for the covenants of the other party. The contract is an entirety. The promises are mutual and are a sufficient consideration between the parties to the contract. *Hawes v. Woolcock,* 26 Wis. 629. Moreover, the contract is under seal, which imports, presumptively at least, a sufficient consideration. Sec. 4195, Stats. (1898); *Carey v. Dyer,* 97 Wis. 554, 73 N. W. 29; *Kuener v. Smith,* 108 Wis. 549, 84 N. W. 850. The covenant that defendant should not sell for less than $10 per acre was for the benefit of plaintiffs, because they had an interest in all moneys received on sales above $6 per acre, in case they elected to purchase. Moreover, by the sale at less than $10 per acre the defendant violated the express terms of the contract and disabled plaintiffs from continuing to make sales upon commission. The plaintiffs had the right to purchase all unsold land at any time before January 1, 1911. The defendant could not sell for less than $10 per acre so as to cut off the plaintiffs' right to purchase; and when it did sell for less, plaintiffs were entitled to the damages occasioned by the breach. But it is argued by respondent that plaintiffs did not exercise their option to purchase. We think the allegations of the complaint show an acceptance of the option in so far as plaintiffs were able to accept. It was not necessary for them to do a vain and useless thing. They allege in their complaint "That said plaintiffs had prepared and were prepared to carry out all of the

provisions of said agreement within the time and in the manner therein specified, and were prepared and intended to purchase all of said lands as specified in paragraph 6 of said agreement," and that they were prevented from so doing by defendant's breach of the contract, which breach disabled defendant from performing on its part; that in the month of July, 1910, defendant informed plaintiffs that it had disabled itself from performing its part of the agreement and refused to further deal with plaintiffs under the agreement, and thereby made it impossible for plaintiffs to carry out the agreement on their part, although they were able, ready, and willing so to do. These allegations admitted by demurrer were sufficient to show acceptance on the part of plaintiffs and offer to perform, in face of the fact that the defendant refused to further deal with plaintiffs under the agreement.

Counsel for appellants relies upon implied terms which he argues necessarily flow from the writing though not expressed. We do not find it necessary to pass upon such contention, since we are satisfied that by the express terms of the contract, together with the allegations of the complaint, a good cause of action is pleaded.

By the Court.—The order appealed from is reversed, and the cause remanded with directions to overrule the demurrer and for further proceedings according to law.

GUIDINGER, by guardian *ad litem*, Respondent, vs. SMALLEY MANUFACTURING COMPANY, Appellant.

January 11—January 30, 1912.

Master and servant: Improperly adjusted machine: Injury to servant: Evidence: Finding of jury: Conclusiveness.

In an action for negligent injury to a servant it is *held* that findings by the jury to the effect that the bursting of a carborundum wheel was caused by a small casting, which plaintiff was grinding, becoming wedged between the face of the wheel and the inner edge of the rest, and that such wedging was due to improper adjustment of the wheel and rest, are supported by the evidence, and that the facts so found are not impossible, demonstrably incorrect, or contrary to unvarying natural laws, so as to warrant interference with the verdict.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The appeal is from a judgment for $2,500 and costs in an action by a servant against the master for negligent injury.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent there was a brief by *Healy & Joyce* and *E. G. Nash,* and oral argument by *Mr. Nash.*

TIMLIN, J. Plaintiff, a minor about nineteen years of age and without experience in that line, on July 4, 1909, while engaged in grinding castings on a carborundum wheel in defendant's machine shop, was injured by the bursting of the wheel. He seeks to recover damages because the defendant failed to instruct or warn him of the dangers attendant upon this work and because the device upon which the castings were held while being ground was improperly adjusted, in that it was too far from the periphery of the wheel. The plaintiff was at the time engaged in grinding small castings called dogs by holding the same upon a device called a "rest." The top

of the carborundum wheel revolved toward the plaintiff and toward this "rest," which crossed the face of the wheel at its horizontal diameter. The "rest" was of cast iron faced with a strip of steel on its upper side, and was fastened to the frame of the machine by a slotted extension running at right angles with the "rest." A bolt through the frame of the machine projected through this slot, and the device was held in place and tightened by a nut on this bolt.

The plaintiff testified that the "rest" was at an estimated distance of one quarter of an inch from the face of the wheel, and that in withdrawing the dog from the "rest," after he had finished grinding it, it was carried down and became wedged between the "rest" and the revolving wheel, whereupon the accident occurred. It appeared that the wheel flew in pieces, one of which struck the plaintiff, injuring him severely. He immediately lost consciousness and remained in that condition for several hours. He really does not know what struck him, but there is no doubt that the wheel burst at this point and that he was struck by one of the flying pieces and injured, and he points to a dent in the face of the wheel as apparently made by the dog wedging in between the wheel and the "rest," also to an abrasion on that part of the "rest" facing the wheel. This wheel made 1,900 revolutions per minute, and there is evidence tending to show that if the "rest" was one quarter of an inch from the face of the wheel the machine was in an unsafe condition. The plaintiff was not instructed or warned concerning this danger.

The defendant's counsel contends that this version of the accident is impossible, and presents the evidence of one Druso, an experienced mechanic who used the carborundum wheel in the morning two hours before the plaintiff was hurt, and who testifies that he adjusted the "rest" at an estimated distance of one thirty-second of an inch from the face of the wheel and fastened it there by tightening the above mentioned nut with an S wrench, screwing it down as tightly as he could. He

also attempts to account for the mark or fracture on the face of the carborundum wheel by showing that the fragment of the wheel bearing this mark flew over against some steel castings, and on the corner of one of the latter was found some carborundum or other substance of which the carborundum wheel was in part composed. He also points to the thickness of the dog as evidence that it could not have become wedged as testified to by the plaintiff if the "rest" was one thirty-second of an inch from the face of the wheel, or, he asserts, even if the "rest" was one quarter of an inch from the face of the wheel.

The jury found that one of these dogs became wedged between the face of the wheel and the inner edge of the plate called the "rest" and thereby caused the wheel to break under the strain of the power moving the wheel; that this wedging was due to improper adjustment of the wheel and "rest" by which they were too far apart; that such adjustment rendered the machine not reasonably safe for use by the plaintiff; that it was negligence to permit or direct the plaintiff to use the machine in this condition; that it was negligence to fail to warn or instruct plaintiff of the danger; and that such acts of negligence were the proximate cause of plaintiff's injury.

The edge of the "rest" which is presented to the face of the wheel is not exactly a straight line, because it has been cut into more than one thirty-second of an inch by touching the wheel. The distances of one thirty-second of an inch and one quarter of an inch are estimates. If we assume that the estimate of Mr. Druso is more reliable because of his apparent disinterestedness and his experience, we are in doing so trenching upon the function of the jury. Besides, there is the element of veracity to be considered in all oral testimony, and this is peculiarly for the jury. Upon examination it does not appear impossible for the dog to become wedged if the "rest" was one quarter of an inch from the face of the wheel. The learned counsel for appellant criticises this disposition of the

case by the trial court with learning and keenness. To a mind that loves accuracy, no doubt this somewhat uncertain mode of determining pivotal questions of fact is repellent. It may be criticised, but it is the best available. The difficulty is inherent and ancient, and mankind has struggled with it for centuries, attempting to solve such questions by ordeal, by battle, by compurgation, by sacred relics, by incantations, or by "magotpies and choughs and rooks." Our present mode is to take the collective and unanimous opinion of twelve jurymen. For this court to interfere with or upset the verdict would be to invade the function of the jury without any assurance that the question of fact would be more accurately or justly decided. We consider there is evidence to support the verdict and that the facts found are not impossible nor demonstrably incorrect nor contrary to unvarying natural laws. Some minor assignments of error are made and have been considered and found untenable.

By the Court.—Judgment affirmed.

TOLLEMAN, Respondent, vs. SHEBOYGAN LIGHT, POWER & RAILWAY COMPANY, Appellant.

January 11—January 30, 1912.

Negligence: Pleading: Variance: Amendment to conform to proof: Appeal: Harmless errors: Street railways: Injury to passenger riding on step: Evidence: Negligence of conductor: Contributory negligence: Proximate cause: Intervening cause.

1. Ordinarily, in an action for personal injuries grounded on negligence, the complaint must show what specific act or acts of negligence are relied upon, and this rule will be enforced where failure to observe it would operate to the disadvantage of the defendant on the trial.
2. In an action for injury to a passenger who, while riding upon the step of the rear platform of an electric car, collided with a pole beside the track, the acts of negligence charged were

failure to provide sufficient seating capacity and placing the poles too near the track. The jury found that the negligence which proximately caused the injury consisted in failure of the conductor (1) to discover and remove plaintiff from the step before the car started, (2) to inform him that he could not obtain a seat, and (3) to discover and remove plaintiff from the step after the car started and before he was injured. No amendment of the complaint was asked or ordered. *Held*, that the findings showed actionable negligence and, as the evidence on which they were based was mainly that of the conductor himself and no claim was made of surprise, a judgment on the verdict for plaintiff would not be reversed.

3. Properly, in such a case, the court should order the complaint to be amended and give defendant an opportunity to make a showing of surprise, before submitting questions as to grounds of negligence not within the issues.
4. The evidence—showing, among other things, that the accident occurred after dark; that the car, already overcrowded, had stopped to let on passengers at a station; that of the seven persons there waiting plaintiff got upon the lower step, two others climbed upon the rear fender, and the other four were unable to crowd on at all; and that the conductor was near the middle of the car and gave the starting signal without leaving that place—is *held* sufficient to warrant a finding that the conductor was negligent in failing to satisfy himself, before starting the car, that the passengers occupied safe positions.
5. Plaintiff, who was seventy-five years of age, having testified that when he stepped on the car he supposed that he would be able to get into the car, that he did not intend to ride on the step, but that the car started immediately and did not again stop before he was struck by the pole, a finding that he was free from contributory negligence was sufficiently supported by the evidence.
6. The swaying of the passengers in the vestibule which pushed plaintiff outward from the car, having been caused by the motion of the car, was an element of danger which the defendant should have foreseen and provided against, and cannot be regarded as an intervening efficient cause of plaintiff's injury, so as to relieve defendant from liability.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

On the evening of December 24, 1909, the plaintiff as a passenger boarded one of the interurban cars of the defendant

railway company. The car was filled to its capacity and the rear vestibule was crowded and plaintiff stood upon a step within the vestibule. After riding some distance, the swaying of the crowd against the plaintiff, caused by the swinging motion of the car, forced plaintiff outward so that he collided with a trolley pole at the side of the track and was thrown to the ground. This action was brought to recover damages for injuries sustained. The following special verdict was returned by the jury:

"(1) While being carried as a passenger on defendant's car and standing on the lower step thereof, at the time and place stated in the complaint, did a trolley pole of defendant's railway collide with plaintiff's body and cause him to be thrown from the car to the ground and injured? *A.* Yes.

"(2) From the time when plaintiff got on the car until he was injured, was it so crowded with passengers that he could not obtain a seat in it by the exercise of ordinary care and effort on his part? *A.* Yes.

"(3) If the conductor had exercised the degree of care which it was his duty to exercise for the safety of passengers, would he have discovered that plaintiff was standing on the car step and have removed him therefrom before the car started from station number seven (7)? *A.* Yes.

"(4) If the second question be answered 'Yes,' then answer this: If the conductor had exercised the degree of care specified in the third question, would he have seen plaintiff on the car step and have informed him, before the car started, that he could not obtain a seat in it? *A.* Yes.

"(5) If, after starting from station number seven (7), the conductor had exercised the degree of care stated in the third question, would he have discovered plaintiff on the car step and have removed him therefrom before plaintiff was injured? *A.* Yes.

"(6) In erecting so near to its railway track, as were, at the time plaintiff was injured, the two trolley poles with which his body came in contact, did the defendant company fail to exercise that degree of care which it was the duty of that company to exercise for the safety of passengers riding on its cars? *A.* Yes.

"(7) If the third, fourth, fifth, and sixth questions, or any one or more of them, be answered 'Yes,' then answer this: Was the negligence the existence of which is found by your answers to the third, fourth, fifth, and sixth questions, or by your answer or answers to any one or more of them, the proximate cause of plaintiff's injury? *A.* Yes.

"(8) If your answer to the seventh question be 'Yes,' then: State particularly what was the negligence which constituted such proximate cause. *A.* That negligence the existence of which is found by the answers to the third, fourth, and fifth questions.

"(9) Before the car started from station number 7, did plaintiff know that he could not obtain a seat in it? *A.* No.

"(10) If the answer to the ninth question be 'No,' then answer this: By the exercise of ordinary care on his part, would plaintiff have learned before the car started from that station that he could not get a seat in it? *A.* No.

"(11) By the exercise of ordinary care on his part, would plaintiff have discovered, before his injury occurred and in time to have prevented it by any means available to him, that while standing on the car step his body might collide with a trolley pole? *A.* No.

"(12) Was there on plaintiff's part any failure to exercise ordinary care which contributed to cause his injury? *A.* No.

"(12½) If plaintiff had not been pushed or pressed outward, as he testified that he was, by some other passenger at the rear of the car, would plaintiff have collided with the trolley pole by which he was thrown from the car step? *A.* No.

"(13) If the court shall be of the opinion that plaintiff is entitled to a judgment in his favor, what sum will reasonably compensate him for his injuries? *A.* Twelve hundred dollars."

Upon such verdict judgment was entered in favor of the plaintiff, from which judgment defendant appeals.

For the appellant there was a brief by *Bowler & Bowler,* and oral argument by *E. R. Bowler.* They cited *Miller v. Kenosha E. R. Co.* 135 Wis. 68, 73, 115 N. W. 355; *Cumberland & W. E. R. Co. v. Thompson,* 102 Md. 193, 62 Atl. 243;

Johnson v. Brooklyn H. R. Co. 63 App. Div. 374, 71 N. Y. Supp. 568; *Moskowitz v. Brooklyn H. R. Co.* 89 App. Div. 425, 85 N. Y. Supp. 960; *Willmott v. Corrigan C. St. R. Co.* 106 Mo. 535, 17 S. W. 490; *Cattano v. Metropolitan St. R. Co.* 173 N. Y. 565, 66 N. E. 563; *McVay v. Brooklyn, Q. C. & S. R. Co.* 113 App. Div. 724, 99 N. Y. Supp. 226; *Snyder v. C. S. & C. C. D. R. Co.* 36 Colo. 288, 85 Pac. 686, 8 L. R. A. N. S. 781.

For the respondent there was a brief by *Collins & Collins,* and oral argument by *W. B. Collins.* They cited, *inter alia, North Chicago St. R. Co. v. Polkey,* 203 Ill. 225, 67 N. E. 793; *Pray v. Omaha St. R. Co.* 44 Neb. 167, 62 N. W. 447; *North Chicago St. R. Co. v. Williams,* 140 Ill. 275, 29 N. E. 672; *Karr v. Milwaukee L., H. & T. Co.* 132 Wis. 662, 113 N. W. 62; *La Barge v. Union E. Co.* 138 Iowa, 691, 116 N. W. 816; *Wanzer v. Chippewa Valley E. R. Co.* 108 Wis. 319, 84 N. W. 423; *Graham v. Manhattan R. Co.* 149 N. Y. 336, 43 N. E. 917; *Beattie v. Detroit U. R. Co.* 158 Mich. 243, 122 N. W. 557; *Walters v. C. & N. W. R. Co.* 113 Wis. 367, 89 N. W. 140.

BARNES, J. The complaint charged that the defendant was negligent in not supplying sufficient seating capacity, in consequence of which plaintiff was obliged to stand on the step of the rear platform of the car; that defendant was negligent in placing the poles which supported the trolley wires too close to the track; and that plaintiff was pushed outward by the crowd on the rear platform swaying against him, owing to the motion of the car, and was injured by coming in contact with one of the trolley poles. The jury found that the defendant was negligent in placing the trolley pole as close to the track as it was placed, but in effect found that this negligence was not the proximate cause of plaintiff's injury. The court submitted three other questions to the jury bearing on the negligence of the defendant, and in answer thereto the

jury found that in the exercise of ordinary care the conductor should (1) have discovered and removed plaintiff from the car step before the car started; (2) that the conductor should have informed plaintiff before the car started that he could not obtain a seat; and (3) that after the car started the conductor should have discovered the plaintiff on the step and should have removed him therefrom before he was injured. The jury found that each of these alleged negligent acts was the proximate cause of the injury. No amendment of the complaint was asked or allowed, and the appellant asserts that it was error to permit a recovery on a charge of negligence not relied on in the complaint. If the pleader had any intention of charging these acts of negligence, he did not make a very happy use of language to express such intent, and under the very liberal rules that have been adopted for the construction of pleadings it is difficult to read out of the complaint any charge of negligence against the conductor, unless it is found in the averment that defendant failed to furnish plaintiff with a seat, something that defendant admittedly could not do without depriving some other passenger of the seat which he occupied. It has often been held that a defendant in a personal injury action is entitled to know what specific act or acts of negligence the plaintiff seeks to charge him with, so that he may prepare his defense. *Odegard v. North Wis. L. Co.* 130 Wis. 659, 676, 110 N. W. 809; *Miller v. Kenosha E. R. Co.* 135 Wis. 68, 73, 115 N. W. 355. This rule manifestly operates to promote justice and fair play, and we have no intention of departing therefrom in any case where failure to observe it operates to the disadvantage of the defendant on the trial. In the present case substantially all of the evidence on which these findings were based was given by the conductor, and it is difficult to see how the defendant was injured by failure to plead more specifically the negligent acts found by the jury. The conductor said he was near the middle of the car when it was brought to a stop at station number 7 by

the motorman to let on passengers, and that he did not leave his place, but gave the signal to start when some one on the rear platform said all right. No showing was made on the motion for a new trial that defendant had or could produce any additional evidence that would or could have any bearing on these questions, and it was not claimed in this court that any such evidence would be forthcoming if a new trial were granted. If the conductor knew of plaintiff's dangerous position and failed to warn or remove him, he would be guilty of a negligent act. If he did not know, and if the jury might find that he was negligent because he failed to learn, we would have a case of negligence established as to either situation, and nothing that could be presented in the way of additional evidence on the point involved could affect this question. So, while we think that the court should have ordered the complaint to be amended and should have given the defendant an opportunity to make a showing of surprise if it could, before submitting the questions complained of to the jury, it is apparent in the present case that the failure to observe the formality of amending the complaint did not harm the defendant in any way, and for this reason there should be no reversal on this ground.

There was sufficient evidence to warrant the jury in finding that the defendant was negligent. The car was apparently overcrowded and so were the vestibules, and passengers were standing on the steps leading into the rear vestibule. It was about 6 o'clock on December 24th, long after dark at this time of the year. In this situation the car stopped to let on still more passengers at station number 7. There were seven passengers to take the car at this place. Two of them climbed on to the rear fender, and the plaintiff got on the lower step of the car. The other four were unable to crowd on at all. The conductor knew of the proximity of the trolley poles to the track and of the danger therefrom to passengers who might be overhanging the car. He should have known of the pro-

pensity of the average passenger to crowd on to a car if it were possible to get a foothold, rather than to walk or wait for another car. Under these circumstances, and considering the high degree of care which a carrier must exercise for the safety of its passengers, the jury might well have reached the conclusion that the conductor did not exercise ordinary care when he failed to satisfy himself before starting the car that his passengers occupied safe positions.

It is further insisted that plaintiff was guilty of contributory negligence and that it should be so held as a matter of law. The jury having found in favor of the plaintiff, we must assume that the evidence most favorable to him on this issue was found to be true. His evidence in substance was that when he stepped onto the lower step of the platform he supposed he would be able to get into the car and that he had no intention of riding on such step, or of riding at all unless he could get in a safe place on the car, but that the car started immediately after he got on the step and that he was obliged either to ride in this position or jump off the moving car; that he grasped the stanchions on either side of the steps and was struck before the car came to a stop and before he had any opportunity to get off. It might be mentioned in this connection that plaintiff was evidently no gymnast, being seventy-five years of age. Upon this evidence the jury might acquit the plaintiff of contributory negligence.

Lastly, it is argued that there was an intervening efficient cause which occasioned plaintiff's injury and therefore there can be no recovery. This alleged cause was the surging or swaying of the passengers in the vestibule against the plaintiff, whereby he was pushed outward more than ten inches beyond the side of the car. There is proof to the effect that this swaying was caused by the motion of the car. It is a matter of common knowledge that cars will sway in going around curves, as well as from other causes, and that persons standing therein will be affected by such motion. Surely this

is one of the things which would ordinarily occur and which would tend to make a position such as plaintiff occupied extremely dangerous. The pressure against plaintiff was an incident that resulted from the running of the car and not from any independent agency dissociated from its operation. So we think the rule invoked does not apply to the facts in this case. *Jackson v. Wis. Tel. Co.* 88 Wis. 243, 60 N. W. 430. This particular element of danger was one which defendant should have seen and provided against.

By the Court.—Judgment affirmed.

STOLZE, Respondent, vs. ANN ARBOR RAILROAD COMPANY, Appellant.

January 11—January 30, 1912.

Carriers of freight: Connecting carriers: Damage to goods: Liability: Presumptions: Goods shipped in bond: Evidence: Burden of proof.

1. Where goods are shipped by several connecting carriers, and the proof shows they were delivered to the first carrier in good condition but were damaged when received by the consignee, a presumption obtains that they reached the last carrier in good condition.
2. Such presumption is not conclusive, however, and casts no absolute liability upon the last carrier, but merely imposes upon it the burden of proving the contrary.
3. The presumption of liability in such cases does not rest upon the fact of opportunity to inspect the goods when received, but upon the necessities of the situation; hence the carrier is not relieved because the goods were shipped in bond under the customs seals of the United States government.
4. The presumption which is applicable to the last of several connecting carriers is equally applicable to any intermediate carrier who is shown to have delivered the goods to a succeeding carrier in a damaged condition.

5. Where the last of several connecting carriers merely switched the goods, packed in cases, over its road a distance of about one mile on a clear day, and the next preceding carrier transported them by both land and water and had them in its possession for six days, and the goods when delivered to the consignee were wet and mildewed, a *prima facie* case of liability was established against such next preceding carrier.

APPEAL from a judgment of the circuit court for Manitowoc county: E. B. BELDEN, Judge. *Affirmed.*

Plaintiff, a manufacturer of Christmas tree ornaments in Manitowoc, had shipped to him from Lauscha, Germany, a number of cases of such ornaments. They reached Manitowoc *via* the defendant's road, on car ferries operated by it across Lake Michigan from Frankfort, Michigan, to Manitowoc, Wisconsin. There the car containing the cases was turned over to the Chicago & Northwestern road and at once switched to plaintiff's warehouse in the city of Manitowoc, a distance of about one mile, where plaintiff removed the cases from the car the same day. He found a number of the cases wet and contents damaged by water and mildew. It did not rain in Manitowoc the day the goods were received. They were dutiable and shipped in bond from Philadelphia to Manitowoc. Plaintiff proved the cases were dry and shipped in good condition from Lauscha, and that they were in defendant's possession at least six days. Defendant offered no evidence. The amount of damages was stipulated and the jury returned a verdict for plaintiff. From a judgment entered thereon defendant appealed.

For the appellant there was a brief by *Nash & Nash,* and oral argument by *E. G. Nash.* They cited, among other authorities, *Atlantic C. L. R. Co. v. Riverside Mills,* 219 U. S. 186, 31 Sup. Ct. 164; *Central of Ga. R. Co. v. Chicago V. Co.* 169 Ala. 287, 53 South. 832; *Mo. Pac. R. Co. v. Wichita W. G. Co.* 55 Kan. 525, 40 Pac. 899; *Ill. Cent. R. Co. v. Foulks,* 191 Ill. 57, 60 N. E. 890; *Joseph v. Georgia R. & B. Co.* 88 Ga. 426, 14 S. E. 591; *Swetland v. B. & A. R. Co.*

102 Mass. 276; *Railroad Co. v. Brewing Co.* 96 Tenn. 677, 36 S. W. 392; *Leo v. St. P., M. & M. R. Co.* 30 Minn. 438, 15 N. W. 872.

Isaac Craite, for the respondent, cited *Laughlin v. C. & N. W. R. Co.* 28 Wis. 204; *Lamb v. C., M. & St. P. R. Co.* 101 Wis. 138, 76 N. W. 1123; *Densmore C. Co. v. D., S. S. & A. R. Co.* 101 Wis. 563, 77 N. W. 904; and other cases.

VINJE, J. The defendant seeks to escape liability on two grounds: first, because it was not the last carrier; and second, even if it were, since the goods were shipped in bond it had no opportunity to inspect, and therefore the presumption that they were received by it in good order should not attach. In the case of *Laughlin v. C. & N. W. R. Co.* 28 Wis. 204, this court held that where several connecting carriers transport goods, and the proof shows they were delivered to the first carrier in good condition, but damaged when received by the consignee, a presumption obtains that they reached the last carrier in good condition, and it will be held liable unless it can show that the damage did not occur while the goods were in its possession. This presumption the law invokes from the necessity of the situation, for when plaintiff has shown the goods were shipped in good condition he has made proof of all facts usually within his power to prove, and has proven facts from which a legitimate inference springs that the defendant received them in the same condition, and the burden shifts upon it to rebut such inference by proof to the contrary. *Lamb v. C., M. & St. P. R. Co.* 101 Wis. 138, 76 N. W. 1123. The probative force of the inference that the last carrier received them in the same condition they were in when shipped may not always, or often, be great, and it is perhaps better to rest the rule upon a policy of necessity, as stated in the *Laughlin Case,* than upon the strict legitimacy or value of the inference. But the presumption obtains and prevails unless overcome by evidence to the contrary, or unless the facts and

circumstances of the particular case conclusively show that it cannot attach. The rule is promotive of justice, and has been adhered to by this court so long that the question of departing from it cannot be considered. It is, moreover, the general rule in this country. *Moore v. N. Y., N. H. & H. R. Co.* 173 Mass. 335, 53 N. E. 816, and cases cited; Van Zile, Bailm. & Carr. (2d ed.) § 536. It is not, however, a conclusive presumption and it casts no absolute liability upon the last carrier, but simply imposes upon it the burden of exonerating itself in order to escape liability. *Lamb v. C., M. & St. P. R. Co.* 101 Wis. 138, 76 N. W. 1123; *Moore v. N. Y., N. H. & H. R. Co., supra; Beede v. Wis. Cent. R. Co.* 90 Minn. 36, 95 N. W. 454; *Susong v. F. C. & P. R. Co.* 115 Ga. 361, 41 S. E. 566; *St. Louis, I. M. & S. R. Co. v. Cooldge,* 73 Ark. 112, 83 S. W. 333; *Gulf, C. & S. F. R. Co. v. Edloff,* 89 Tex. 454, 34 S. W. 414, 35 S. W. 144; *Burwell v. R. & G. R. Co.* 94 N. C. 451; *Morganton Mfg. Co. v. O. R. & C. R. Co.* 121 N. C. 514, 28 S. E. 474; 3 Hutchinson, Carr. (3d ed.) sec. 1348, and cases cited.

In view of the rebuttable nature of the presumption that the damage has been occasioned by the last carrier, it becomes unnecessary to decide whether the defendant or the Chicago & Northwestern Railway Company was such. Conceding that the latter was the last carrier, the admitted facts conclusively establish that the damage to the goods did not occur while in its possession. The contents of the boxes could not have become wet and mildewed while the car containing them was being switched a mile on a day of no rain. This is so self-evident that the mere statement of the proposition is the best argument in support thereof. It is an admitted fact, however, that the defendant was the next preceding carrier to the Chicago & Northwestern Railway Company, and that it transported the goods over Lake Michigan in a car ferry, and also on land, and that it had them in its possession at least six

days. Under such circumstances the damage *may* have been done while it had the goods, and, since it offered no evidence to relieve itself from the presumption that the damage occurred while they were in its possession, a *prima facie* case of liability on its part was established. For the presumption that is applicable to the last connecting carrier is equally applicable to any intermediate carrier who is shown to have delivered them to a succeeding carrier in a damaged condition. 3 Hutchinson, Carr. (3d ed.) sec. 1348, and cases cited.

It is claimed the presumption should not attach to the defendant because the goods were shipped in bond from Philadelphia to Manitowoc and it had no opportunity to examine them when they came into its possession because it could not break the customs seal of the United States government. An examination of authorities will show that some courts rest the presumption of liability, at least in part, upon the fact of opportunity to inspect when the goods are delivered to it, but we think the safer ground to rest it upon is that arising from the necessities of the situation. As was said in the *Laughlin Case* (28 Wis. 204):

"The defendant was bound to receive and transport the boxes when tendered. It was bound to receive them in the condition in which they were. It had no means of investigation or inquiry into their contents. It had no right to open the boxes or examine what they contained, and if it had, could not have detected the loss by such examination, and so have refused to receive and carry. It must take the boxes as they were, with no external signs or appearances of breaking or injury, and nothing to give warning that the cloths had been previously abstracted or removed, and carry them forward to their place of destination."

It appears from this that the very case which established the rule applying the presumption of liability to the last carrier was one in which there was no opportunity to inspect. So it

cannot be urged that our court based the rule in the first instance, either in whole or in part, upon the ground of opportunity to inspect. It declared the rule in spite of a total lack of such opportunity, and, as we believe, upon the persuasive grounds of promoting justice when it would otherwise fail.

By the Court.—Judgment affirmed.

ADOLPH and another, Respondents, vs. ADOLPH and others, Appellants.

January 11—January 30, 1912.

Reformation of written instruments: Fraud or mistake: Degree of proof: Parent and child: Conveyance and contract for support: Consideration: Construction.

1. Duly acknowledged written instruments are not to be set aside or reformed on the ground of fraud or mistake unless the fraud or mistake be established so clearly as to leave no substantial doubt.
2. A son purchased his parents' farm, paying $1,600 in cash and being allowed $600 for wages. A deed reciting a consideration of $5,600 and providing that the son should support the parents during their lives and in case of non-agreement should pay them $2,400; a mortgage for $3,400, said to be "the balance due" on the property, to become due ten years from date; and a bond for the parents' support, or in case of non-agreement for payment to them of $2,400, were executed. The mortgage was not accompanied by a promissory note, but referred to a bond bearing even date. *Held* that, although said instruments are confused in their recitals and are incomplete, it is not necessary to reform them on the ground of fraud or mistake, but with the aid of the oral evidence the real contract of the parties can be gathered from them, to wit: that the whole consideration was $8,000, that the mortgage expressed the amount that was to be paid in any event, and that the bond secured payment of the value of the support in case the parties could not agree to live together.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This is an action in equity to declare and enforce an equitable lien for unpaid purchase money upon an eighty-acre farm. The plaintiffs are husband and wife and of the ages of seventy-eight and seventy years, respectively. Prior to July 31, 1907, they owned and resided upon the farm in controversy, and had resided there for about fifty years. They had four sons and four daughters, all adults, and six of them resided away from home. One son, the defendant *Anton,* aged thirty-one years, and one daughter, named Mary, then resided on the farm with their parents. *Anton* had lived upon the farm since reaching his majority, and worked thereon nearly all the time, excepting for several years he had in the fall season operated a threshing machine for his own profit. There was upon the farm live stock, farm machinery, and implements of the value of about $1,000. The value of the farm itself is not very satisfactorily proven. Some witnesses place the value as low as $4,800, but there is other evidence tending to show that it was worth considerably more. The defendant *Anton Adolph,* when assessor, assessed it at $4,900. On the 31st of July, 1907, an arrangement was made between the plaintiffs and the defendant *Anton* by which the farm was deeded to *Anton* in consideration of an agreement to support the plaintiffs during their lives, the payment down of $1,600 in cash, and the payment in the future of certain other sums, the amount of which is in dispute in this action. The papers were drawn by one Bertsche, a neighboring justice of the peace, who had little idea as to how such papers should be drawn. The papers consisted of a warranty deed, a mortgage, and a bond. The deed was on a printed blank in the usual form, recites a consideration of $5,600, and contains the following provision immediately after the description of the real estate:

"All Personial Property now on premises and Household Furniture Except Thre Beds. Party of the second part also Agres to Leave partys of the first partys to have the youse of

the House and One Bed room in the first Story siduaded in the South West Corner and to Provide them with suvicent Provisions for there living during natural Live and in case of non agreement said party of the second part agrees to pay to Partys of the first Partys Two Thousand Four Hundred Dollars ($2,400) for there support."

The mortgage which was executed by *Anton* at the same time and covers only the homestead forty-acre tract states that it is given "for and in consideration of the sum of $3,400." It also contains the following proviso, those parts which are in italics being written, and the remainder being part of the printed blank:

"Provided . . . that if . . . the party of the first part . . . shall . . . pay or cause to be paid to the said *partys* of the second part . . . the sum of *three thousand four hundred with interest at the rate of three and one-half per cent.* (3½%) *per annum. The above mentioned sum is the balance diew on above described property and becomes diew on the thirty-first day of July, 1917. But payments can be made on and before that time and in sums to suite* according to the conditions of a certain *bond* bearing even date herewith executed by . . . said party of the first part to the said *partys* of the second part as collateral security, then these presents and the said . . . shall cease and be null and void."

The bond executed at the same time by *Anton* to his parents in the penal sum of $2,400 was conditioned that the said *Anton*

"shall well and truly pay or cause to be paid unto the above named *Christ Adolph* and *Regena Adolph* his wife or a certain Attorney executors administrator or assigns the sum of Two Thousand Four Hundred Dollars on demand in case of Non Agreement without fraud or delay then the preceding obligation is to be void otherwise to remain in full force and virtue.

"Said *Anton Adolph* also agrees to provide said *Christ Adolph* and *Regena Adolph* his wife with the youse of the house and one Bedroom three Beds Provisions and fuel while

they agree and in case of Disagreement said *Anton Adolph* shall pay on demand the said Two Thousand Four Hundred Dollars and after the Deth of said *Christ Adolph* and *Regena Adolph* this Bond shall be void and of no effect."

No further papers were executed, but the deed, mortgage, and bond were recorded in the office of the register of deeds three days later. At the time the papers were executed *Anton* paid $1,600 in cash to his father. No promissory note was executed because the scrivener did not know that such a paper was usual or necessary. After the execution of these papers the plaintiffs and their daughter Mary and *Anton* continued to live together in the homestead until *Anton's* marriage in June, 1908. Thereafter there was more or less discord, and the daughter Mary left the homestead in August, 1908, and in the following November the parents left because of the disagreements and never returned.

The plaintiffs claim in this case that the arrangement which they made with their son *Anton* was that he was to pay a total consideration of $8,000 for the farm, viz.: $1,600 down, $3,400 within ten years after the sale, the payment of which was to be secured by the mortgage on the land, and a balance of $3,000 was to be paid in case they could not live agreeably with *Anton* and decided to leave the house and live elsewhere. On the other hand, *Anton* claims that the real agreement was that he was to pay $5,000 for the farm, of which $1,600 was to be paid down, $1,000 was to be paid in ten years, and $2,400 was to be paid in case the parties could not agree and the plaintiffs were forced to live elsewhere. The plaintiffs and their daughter Mary and their son Christ testified that the transaction was in substance as the plaintiffs claimed it to be. On the other hand, the scrivener and the defendant *Anton* testified to the other version. The court found in accordance with the plaintiffs' version, except that it was found that the agreement was modified before the execution of the papers

so that *Anton* was allowed $600 for wages, leaving $2,400 instead of $3,000 as the amount to be paid in case the parties could not agree to live together.

On November 11, 1909, the plaintiff *Christian* delivered the bond and mortgage to an attorney for collection, and in the following month *Anton* paid to the parents the sum of $3,400 and interest to the date of the payment. Thereupon the plaintiffs executed a release in satisfaction of the mortgage, which recites that the bond for which the mortgage was given as security "is fully paid, satisfied, and discharged." This action was brought soon after the discharge of the mortgage.

The trial court, after finding the facts as above stated, concluded that there was still $2,400 of the purchase price of the premises unpaid, and that the sum constituted a lien upon the entire premises. Judgment was entered providing for the enforcement of such purchase-money lien, and from that judgment the defendants appealed.

Isaac Craite, for the appellants.

For the respondents there was a brief by *Charles Voigt,* attorney, and *Emil Baensch,* of counsel, and oral argument by *Mr. Voigt.*

VINJE, J. It is contended by the defendants that it is necessary to reform and correct the deed and mortgage in question in order to sustain the plaintiffs' recovery in this action, and hence that the evidence must be so clear and convincing as to leave no substantial doubt. Starting from this premise he contends with much reason that the evidence does not come up to the required standard and that the judgment must be reversed. The premise is doubtless correct: duly acknowledged written instruments are not to be set aside or reformed on the ground of fraud or mistake unless the fraud or mistake be established so clearly as to leave no substantial doubt. *Burnham v. Burnham,* 119 Wis. 509, 97 N. W. 176, and cases

cited. We are unable, however, to conclude that it is necessary to set aside or reform any instrument in the present case. The most that can be said is that the various written instruments are confused and incomplete. It cannot be said that they contain provisions which fix the amount of the consideration at any sum less than $8,000. The deed acknowledges receipt of a present consideration of $5,600 and contains a provision that the grantee in addition is to support the grantors during their natural lives, and in case of nonagreement pay them $2,400. This clearly points to a total consideration of $8,000. The mortgage is for the sum of $3,400, which is said to be the "balance due" upon the property, and that sum unquestionably was the entire balance due at that time, because plaintiffs were to live with the defendant *Adolph,* and the $2,400 named in the deed was not due and would never become due except in the contingency (then doubtless regarded as remote) that the parties could not agree to live together.

It seems to us much more probable that the scrivener would have drawn the papers as he did if the agreement was as contended for by the plaintiffs than if it was as the defendants contend. A consideration of $5,600 was recited in the deed, made up as follows: $1,600 cash; $600 allowed for wages—deducted from the claim of $3,000 for support,—and balance of $3,400 secured by mortgage. The deed further provided that the grantee should support plaintiffs in the old home during their natural life, and in case of disagreement pay $2,400 in lieu of support. The scrivener, after the substance of the proposed agreement was explained to him, called the attention of the parties to the fact that in case of a disagreement the plaintiffs had no security for the $2,400 due them for support, and suggested a bond. This was agreed to. So he made out a mortgage for $3,400 on the homestead forty, and a bond for $2,400, to be valid only in case of a disagreement. If it was understood by the parties, as now claimed by

defendants and the scrivener, that the $2,400 in the bond was included in the mortgage, then the plaintiffs had ample security for their support and no bond was necessary. Yet all the parties testified that the scrivener suggested a bond as security for the support in case of a disagreement. It is now claimed by the defendants that in case plaintiffs continued to be supported till their death, only $1,000 of the mortgage of $3,400 was to be paid, but that they were to pay interest on the whole sum whether or not there was a disagreement. If that was the contract, it is difficult to see why those provisions were not mentioned somewhere in the papers, by way of recital or otherwise. To sustain such an agreement necessitates more of a reformation and greater disregard of provisions in the papers than does the sustaining of plaintiffs' claim. As before stated, this is a case where the real contract made by the parties must be gathered from what was actually intended to be done rather than from the contents of the papers drawn, owing to their confused recitals and to the admitted fact that the scrivener did not carry out the intent of either party as now claimed. In our judgment the mortgage expressed the amount that was to be paid in any event, and the bond was given to secure the value of the support in case of a disagreement. We are led to this conclusion not only by the findings of the trial court and the weight of the oral testimony, but by the papers as actually drawn. True, there are recitals in the papers inconsistent with this conclusion, but they are not deemed controlling for reasons already stated. We are satisfied the trial court properly found there was still due the sum of $2,400 on the purchase price and that such sum was a lien upon the entire premises.

By the Court.—Judgment affirmed.

F. G. SMITH PIANO COMPANY, Appellant, vs. BUSCHEK, Respondent.

January 11—January 30, 1912.

Sales: Breach of warranty.

In an action for the purchase price of a piano, a finding by the jury that there was a breach of a warranty against defects is *held* to be sustained by the evidence.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action to recover the balance of the purchase price of a piano.

The defendant pleaded breach of warranty, seasonable rescission of the sale contract, and demand for the money already paid, and counterclaimed therefor.

The court submitted the cause to the jury on the subject of whether the conceded warranty was breached. The finding was for the defendant. All other questions requisite to be solved in her favor to support a judgment for her were so decided by the court without any complaint because any of them should have been submitted to the jury. Judgment was rendered for defendant, and plaintiff appealed upon the sole ground that the finding as to the piano being defective was not warranted by the evidence.

Isaac Craite, for the appellant.

F. F. Groelle, for the respondent.

MARSHALL, J. It is the judgment of the court that the record does not sustain the contention on appellant's part that there is no reasonable basis in the evidence for the jury finding complained of. Therefore the judgment must be affirmed.

By the Court.—Judgment affirmed.

STATE EX REL. GROTEGUT and others, Respondent, vs. WUENSCH and another, Town Clerks, Appellants.

January 11—January 30, 1912.

Schools and school districts: Creation of new district: Certiorari *to review action of town board: Limitation: Laches: Appeal to state superintendent.*

1. As a general rule a writ of *certiorari* to review the proceedings of a town board in such a matter as the creation of a new school district should not be granted after the expiration of two years after such proceedings are had.
2. The state superintendent has no authority, upon an appeal from an order creating a new school district, to determine the question of the jurisdiction of the town board to make the order; and pendency of such an appeal is not sufficient to excuse a delay of nearly three years in applying for a writ of *certiorari* to review the proceedings of a town board on the ground that there were jurisdictional defects therein.
3. Upon an application for the writ under such circumstances, where it appears that the people of the new district, in reliance upon the action of the town board, have maintained a school, collected school taxes, received an apportionment of state tax, and taken steps to acquire a site and contracted for a school house, and there is no showing that the writ is necessary to prevent injustice, it is *held* that there are no equitable grounds for making an exception to the rule limiting the issuance of such writ to two years.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

On August 3, 1907, the town board of the town of Centerville, Manitowoc county, upon a petition of residents of parts of school districts No. 1 and No. 4, made an order creating school district No. 6 of the town out of the territory of district No. 1, and another order making a division of the school property of the old district between it and the new district.

On appeal to the state superintendent of public instruction a decision was made reversing the order creating the new district. This decision was rendered more than ten months after

the appeal was perfected. On a writ of *certiorari* the circuit court reversed the decision of the state superintendent under sec. 497, Stats. (1898), on the ground that his decision had not been rendered within thirty days after the appeal had been submitted to him. The decision of the circuit court was affirmed by the supreme court in *State ex rel. Schuette v. Cary,* 143 Wis. 83, 126 N. W. 562.

About six weeks after the rendition of the decision of the supreme court, which was almost three years after the order creating the new school district had been made, the relators petitioned the circuit court for a writ of *certiorari* to review the proceedings of the town board creating the new district, on the ground that there were jurisdictional defects in the proceedings of the town board in creating the new district. Upon proper proceedings the clerk of the new district was made a party defendant and he also made a return to the writ.

It appears from the returns to the writ that the order creating the new district was not to take effect until the next year. At the proper time the new district was organized, officers were elected, and resolutions adopted providing for the maintenance of a school by the district, the borrowing of money to build a school house, etc. These proceedings were repeated in each of the first two years; no district school was separately maintained by the new district; no taxes were collected by it; and no other proceedings for the maintenance of a school taken, but the taxes in this district were collected therefrom as if it were part of the old district, and the children of the district attended school at the old district school house. The next year the new district maintained a school, collected taxes for school purposes, received an apportionment of state taxes, paid rent for a building by making repairs, took a school census, and did the acts necessary to the existence of an independent school district. At the next school meeting provision was made for raising the money to purchase a site for

the proposed new school building, plans were prepared for the building, and it is alleged that an excavation was made and that materials for the construction of the building were hauled to the premises. The work on the new school house, it is asserted, was stopped when the writ in this case was issued.

The defendants moved that the writ be quashed for the reasons (1) that more than two years had elapsed between the time of the making of the orders by the town board and the time of the issuance of the writ; (2) that the relators had been guilty of laches in applying for the writ; and (3) that great inconvenience to the public would result if the relief sought by the relators were granted.

The court held that, in view of the pendency of the former action, the relators had not been guilty of laches in instituting these proceedings, that any expense incurred by the new district had not been incurred with the acquiescence of the opponents to the creation of the new district and had not been incurred because of their inactivity, and that the orders creating the new district and making a division of the school property were admittedly void. Judgment was ordered for the relators, declaring the orders of the town board creating the new district and for a division of the school property void, and giving the relators costs. This is an appeal from such judgment.

Edward Voigt, for the appellant *Schuette.*

F. F. Groelle, for the respondent.

SIEBECKER, J. In the light of the facts and circumstances shown and from the history of the proceedings to create this new school district, as above stated, nothing appears showing that the orders of the town board creating the new district and apportioning the property were not in accord with the best interests of all persons concerned in the matter. They are assailed only because it appears that the town board failed to obtain jurisdiction to make them by reason of irregularities

in giving notice of their meeting to consider the petition. While a challenge to these orders for want of jurisdiction would necessarily result in setting them aside in a proper proceeding as a matter of right, that is not the situation now presented. The relators are now called upon to show that the issuance of this writ to review the town board's proceedings should be granted to prevent injustice being done. Admittedly, the relators are not within the two-year period to which the issuance of a writ of *certiorari* for reviewing the action of town boards in matters of this nature is usually limited. As declared in *State ex rel. Dalrymple v. Milwaukee Co.* 58 Wis. 4, 16 N. W. 21:

"The party who has rights which a court is bound to protect may in all cases bar himself of that right by his laches; and as those who seek to review the judgments and orders of courts are, as a matter of public policy, required to take the proper steps for obtaining such review within a limited time, . . . there is great propriety in holding that the party who seeks to review and vacate proceedings not strictly of a judicial character, should proceed within a reasonable time to accomplish that purpose or be barred of his remedy."

To the same effect is *Wilson v. Heller,* 32 Wis. 457.

The question of the town board's jurisdiction to make the orders cannot be inquired into or determined on an appeal to the state superintendent under sec. 497, Stats. (1898). See *State ex rel. Schuette v. Cary,* 143 Wis. 83, 126 N. W. 562. To obtain such relief those assailing the action of the town board for want of jurisdiction were required to apply for a writ for that purpose. This they did not do for a period of nearly three years after the orders were made. This left the orders in force and operative, and authorized the residents of the new district to act under them. This they did, and they vigorously asserted in the litigation assailing them on the merits that they were justly made and should be confirmed. In reliance on the action of the town board the people of the district have taken steps for acquiring a school-house site and have

contracted to construct a building thereon. They also paid and received from the state the proper portion of the state school moneys, and provided at the district's expense accommodations and a teacher for one term of school, which was actually held in the district. This condition of affairs, when considered in the light of all the facts and circumstances of the parties, negatives all equitable claims of the relators for permission to prosecute this writ at this late day. We find no grounds upon which to justify this application as an exception to the rule limiting the issuance of a writ to the period of two years from the time the orders were made by the town board, and we feel constrained to deny the relief awarded in the proceeding by the trial court.

By the Court.—The judgment appealed from is reversed, and the proceeding remanded with directions to dismiss the writ.

RUCK, by guardian *ad litem,* Respondent, vs. MILWAUKEE BREWERY COMPANY, Appellant.

January 11—January 30, 1912.

Master and servant: Latent danger: Failure to warn: Evidence: Weight and sufficiency: Questions for jury: Special verdict: Form: Instructions to jury: Trial: Prejudicial proceedings: Excessive damages: Loss of eye.

1. **The weight of evidence and the effect of alleged contradictions and impeachments are matters peculiarly within the province of the jury and not questions of law for the court.**
2. **The defendant cannot complain of the refusal of the trial court to submit questions proposed for special verdict in so far as such refusal constitutes, in effect, a ruling that the evidence upon such questions is insufficient to sustain any claim of the plaintiff.**
3. **Rejection of questions proposed for special verdict is not error where the matters embraced therein are fully covered by the questions which are submitted.**

4. In determining whether or not sentences and parts of sentences excepted to in the charge to the jury were incorrect or misleading, they must be considered and interpreted in connection with the other parts of the charge and the questions in the special verdict to which they were directed.
5. Recalling the jury immediately after they had retired, and stating that upon request of plaintiff's counsel the court would instruct them as to the burden of proof, was not in this case a proceeding prejudicial to defendant, although the court had refused, in the presence of the jury, to instruct as requested by defendant's counsel upon the burden of proof.
6. Refusal to give a requested instruction is not error where the material parts thereof are included in the instructions given, which fully cover the questions submitted to the jury.
7. An award of $7,000 for injuries to a boy under seventeen years of age, resulting in the loss of one eye, impairment of the sight of the other, and disfigurement by reason of inability to wear an artificial eye, is *held* not so excessive as to warrant interference by this court. MARSHALL and VINJE, JJ., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: W. J. TURNER, Circuit Judge. *Affirmed.*

The plaintiff, sixteen years and nearly five months of age, on July 3, 1907, while employed in the bottling department of the brewery of the defendant, received an injury by being struck in the eye by a piece of glass from an exploding bottle. The injury resulted in the loss of the eye. A statement of the findings of the jury upon this trial, in addition to the statement of facts contained in the report of the case on a former appeal (144 Wis. 404, 129 N. W. 414), is all that is necessary to fully present the facts of the case.

The jury found that the plaintiff was directed by the foreman to assist in "piling out" bottles of beer from the steam tank to the trays in which they were carried to the labeling machine; that there was a latent danger that the bottles, after being taken from the steam tanks and set upon the trays, would explode, while they were standing still, without the application of any external force to the bottles; that the defendant had knowledge prior to the time of injury of the latent danger; that the defendant negligently failed to warn the plaintiff

of the latent danger, and that such negligence was the proximate cause of the injury; that the plaintiff did not in the exercise of ordinary care know of the danger; that the explosion which caused the injury was not produced by the bottles being struck together by reason of the manner in which the plaintiff performed his work; that the defendant was not guilty of negligence in furnishing the plaintiff with a tray constructed as was the one used by him; and that no failure on the part of the plaintiff to exercise ordinary care contributed in any degree to produce his injury. The jury also agreed upon $7,000 as the sum which would reasonably compensate the plaintiff for his injuries. This is an appeal from the judgment on the verdict.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent there was a brief by *Glicksman, Gold & Corrigan,* and oral argument by *W. L. Gold.*

The following opinion was filed January 30, 1912:

SIEBECKER, J. The former decision in this case on appeal to this court declared the rules applicable to the facts at issue between the parties and must control in the determination of the questions presented.

The verdict is assailed upon the ground that the evidence does not sustain the findings of the jury. In substance, we find the state of the evidence not unlike that on the former appeal, wherein it was held that it presented a jury question. 144 Wis. 404, 129 N. W. 414. The contention is however made that the evidence of plaintiff and of the witnesses who testified on the subject of the alleged danger from the explosions of bottles after being placed on the tray at rest and protected from external force, and on the subject of defendant's want of care as to knowing of such danger and warning employees thereof, differs from the facts on the former trial in

that it is so unreasonable, contradictory, and unreliable that it furnishes no basis for any inferences to be drawn by the jury. The argument is made that the contradictions in this evidence are so manifold and the other forms of its impeachment are so destructive of its probative force that the former holding of its sufficiency cannot control. This position is not tenable. The weight of the evidence adduced and the effect of the alleged contradictions and impeachments are matters peculiarly within the province and functions of a jury, and their duties in this regard cannot be assumed as questions of law by the court.

It is urged that the court erred in rejecting twenty-one of the twenty-three questions submitted by the defendant as part of the special verdict. The special verdict submitted by the court is correct. It embraces the questions of the ultimate issuable facts presented by the pleadings and the evidence, and the findings in response thereto by the jury establish a complete cause of action and good ground for a judgment determining the rights of the parties as litigated upon the trial.

It is however claimed that the defendant was prejudiced by the rejection of these questions because they pertain to issues of fact raised by the pleadings and concerning which evidence had been adduced. In so far as these proposed questions cover inquiries that are not part of the issues embraced in the verdict actually rendered it cannot be prejudicial, because in effect the court's rejection thereof constitutes a ruling that the evidence material thereto was insufficient to sustain any claim of the plaintiff and hence is a ruling in appellant's favor. Do any of the rejected questions form part of the issues embraced in the verdict rendered which are not properly included and passed upon by the verdict of the jury? From a study and examination of the requested questions we find that the only special issue of fact calling for submission in connection with the ultimate issues embraced in the verdict

was an inquiry as to whether or not the explosion and consequent injury to the plaintiff was caused by the bottles being struck together through the plaintiff's manner of performing his work, and this the court submitted by question 8 of the verdict. We find no error in the rejection of the questions proposed.

Exceptions are taken to certain sentences and portions of sentences of the instructions to the jury. We have examined them and find they were correct and that they contained nothing misleading when interpreted in connection with the other parts of the charge and the questions in the verdict to which they were directed.

Immediately after the jury retired, the court recalled them to the court room at the request of the plaintiff's counsel and stated that upon the request of plaintiff's counsel he would instruct them as to the burden of proof in the case, and proceeded to do so. It is urged that this was a prejudicial proceeding. The statement by the court that he recalled the jury at the request of plaintiff's counsel, after having refused in their presence to instruct as requested by defendant's counsel, cannot be said to have operated prejudicially upon the jury under the circumstances. Recalling the jury was a plain duty of the court, and we discover nothing improper in the court's manner of performing it.

Nor do we discover anything prejudicially erroneous in the court's charge defining negligence, or in the statements of the claims of the respective parties under the evidence. The instructions given fully cover the questions in the verdict, were correct, and contained the material and essential parts of the rejected requests to instruct.

A number of detailed exceptions to rulings on evidence are urged upon us as erroneous, because several witnesses were permitted to testify on redirect examination on the matter in their examinations on the former trial, and because the court improperly permitted cross-examination of the defendant's

witnesses on matters not touched upon in their direct examination. The points referred to in these examinations were relevant and material to the questions litigated, and the evidence adduced was competent. We find nothing to show that the court unduly extended the scope of the inquiries or the privilege of cross-examination to such an extent as to elicit facts not covered in direct examination.

The award of damages is assailed as excessive. It appears that plaintiff's eye had to be removed. The plaintiff testifies that he suffered considerable pain from the treatment and operation, that he is unable to wear an artificial eye, that the afflicted side of his face is somewhat diminished in size and exhibits the disfigurement resulting from the vacant eye socket, that he has pains in this region of his face, and that the sight of the other eye is not as good as before the injury. The fact that plaintiff is young in years makes the injury and damage greater than if it had occurred to him in a later period of his life. True, as appellant claims, this court limited the recovery in *Olwell v. Skobis,* 126 Wis. 308, 105 N. W. 777, for the loss of an eye to $6,000; yet it cannot be held that such a sum is to be regarded as the maximum amount for injuries of this nature. In the very nature of things the amount which will compensate a person for an injury which must attend him through life cannot be measured by strict and definite rules and must be left largely to the sound judgment of a jury, and the trial judge. Another case illustrative of this subject is the case of *Coolidge v. Hallauer,* 126 Wis. 244, 105 N. W. 568, wherein the jury awarded $7,000 to an operator of a button machine, twenty-eight years of age, as compensation for the loss of an eye. Though exception had been taken to the amount as excessive, it was not urged that it was excessive upon appeal to this court, and we must conclude that the parties did not regard this amount as excessive for such an injury. The trial court in this case approved the award of the jury as reasonable and just. We do not con-

sider that this court should, as matter of law, hold the amount awarded to be unreasonable and excessive.

By the Court.—Judgment affirmed.

The following opinion was filed March 4, 1912:

MARSHALL, J. (*dissenting*). Duty, it seems, calls me to dissent as to the damages. I would not do so on any unsubstantial ground or where, to my view, the matter was doubtful. With due respect, I trust, for the opinions of others, here the error seems clear; the approved recovery to violate precedent, violate the logic of legal damages in such cases, violate legislative policy in general, and be detrimental to public welfare.

My judgment is not better than that of any of my brethren, but no judge can be truly loyal to duty without standing by firm convictions created by careful reflection and consideration.

In view of my oft expressed opinion respecting the ethical right of every employee to just compensation for inadvertent bodily injuries received in the course of his employment, regardless of the source of fault, it cannot be thought I am not keenly sensible to human suffering in such cases. But one must hold to legal, just, practicable standards as he understands the matter.

I repeat what I have urged before,—personal injury losses in service, necessarily, must enter into the cost of production to be paid, ultimately, by the consumer, according to an economic law as certain in its operation as any in nature,—there is no escape from it. Invisible and unappreciable as it is,—as much so as the forces which control the planets, the ultimate point of rest of all such losses is the body of the products entering into consumption. Humanity as well as conservation of human resources and welfare, require this great truth to be appreciated, as I have taken the liberty, sev-

eral times, of suggesting. *Monaghan v. Northwestern F. Co.* 140 Wis. 457, 122 N. W. 1066; *Houg v. Girard L. Co.* 144 Wis. 337, 352, 129 N. W. 633; *Knudsen v. La Crosse S. Co.* 145 Wis. 394, 130 N. W. 519.

However, the idea of compensation, whether vitalized by common-law rule or written law or left to rest in mere ethical standards, springs from one's sense of justice under all the circumstances, keeping in mind that full compensation is impossible, the attempt to effect it destructive, and that those who furnish opportunity for employment as well as the employed are to be considered in dealing with the matters which are the inevitable incidents of industry, the common misfortune and common burden.

True logic in the field under discussion is stated in *Guinard v. Knapp, Stout & Co. Co.* 95 Wis. 482, 70 N. W. 671, and often approved here:

"Although the defendant may have committed a fault, it is not, for that reason, an outlaw nor beyond the care of the law. Society may still receive valuable service from it, and so is interested to preserve it against spoliation, by applying to plaintiff's recovery a proper limit of compensation. It could not advance the interests of society to impoverish and bankrupt the unfortunate defendant. . . . Absolute indemnity is impossible. . . . The most [the law] aims to do . . . is to give some just compensation for the damages suffered."

To go further in an effort to repair a personal injury loss than as above indicated, would establish a new rule, productive of waste, which legislatures all over the land have been striving to prevent. Exorbitant recoveries encourage litigation, demoralize the profession, discourage industry, prejudice general welfare, and bring down criticism upon the courts as inefficient to maintain a practicable standard of justice. Just compensation to the injured is a legitimate part of created things; any excess with its large public and private incidental expense, constitutes waste, abnormally increasing the price of consumable things, decreasing indus-

trial activity and opportunity for labor, bearing down wages and up the cost of worth-while existence. From any viewpoint, courts should co-operate with the lawmaking power to make recoveries certain and economical, where there is a right to recover, but always within reasonable limits.

The foregoing prefatory remarks seem proper as a basis for what I may say as to the particular recovery. To appreciate my view of the case, it must be surveyed as I read the record.

The boy was sixteen years old. He had substantially entered into his real place in the social state. He was twenty at the time of the trial. He was rather dull, without education or capacity for much development, and could not well be thought to have had fair prospect of rising above the level of common labor. He was in the hospital but a few days. His case ran the usual course to a substantial recovery. His general health and working capacity were not materially impaired. He yet, occasionally, senses some abnormal feeling, akin to pain. He returned to work for appellant, as he said, in about three weeks and continued some three years and till after the first trial of this case. He worked elsewhere till about the time of the last trial. He said he could not wear a false eye because it hurt him; but there was no expert evidence as to difficulty in that regard. It is to be presumed he could, as every one in such circumstances has to, accustom himself to use of a false eye, substantially restoring his former personal appearance. In short, the case is ordinary, so far as the injury is concerned, and rather below it as to pecuniary loss. If it so looked to my brethren I hardly think the $7,000 judgment would have been approved.

What does the recovery mean under the circumstances? The service activity of such a person is never regular. There are interruptions by causes too numerous to mention, reducing average working time for life, probably, to 250 days per year and average yearly wages to $350 or less. The

expectancy of life was forty-seven years. In the period of old age, working time, efficiency, and remuneration would be greatly reduced. Interest on $7,000 will afford more than the full wage value of his life and leave, considering his station, a large fortune. Looking at the matter in another aspect, the recovery is equivalent to a life annuity for the man of $25 per month. Does the law contemplate any such thing?

True, there may be large attorney's fees to be paid, but the law does not contemplate any enhancement of the recovery on that account. How much, as a fair measure of the loss, under the circumstances, regardless of litigation? That is the question. In contemplation of law, expenses, so far as the losing party should pay them for his adversary, are measured by the cost bill. An instruction to consider the additional cost to plaintiff in awarding damages, would be promptly condemned. So we deal with the $7,000 as given for loss, independently of the litigation.

Now are there precedents here for such a recovery as the one before us,—precedents for affording a person injured by loss of an eye without materially injuring health or working capacity, except for a brief period, the full value of his life in compensable labor feature?

The court refers to *Olwell v. Skobis,* 126 Wis. 308, 105 N. W. 707. It was this: A young, well educated, comely lady of experience in a profession which required good eyesight to enable one to serve well,—one able to earn more than a common laborer by far, and of good prospects, lost an eye. The case was extraordinary in many aspects. The injury practically destroyed the young woman's valuable life prospects. The jury awarded $12,000. The trial court approved it. This court thought it manifestly excessive. The judgment was reversed on several grounds, rendering an option to take a new judgment impracticable. The court suggested that no sum in excess of $6,000 could be sustained on the evidence.

Had the case been one for an optional judgment the amount would, doubtless, have been placed as low as $2,000 or $3,000. The court justified the decision by referring to the fact that, in general, recoveries in such cases had been for from $2,000 to $5,000. How can we say then that the court did not hold $6,000 to be the maximum for loss of an eye, even under very distressing circumstances, and that, in general, $5,000 to $2,000 is about right?

The court further refers to the recovery of $7,000 in *Coolidge v. Hallauer,* 126 Wis. 244, 105 N. W. 568. Plaintiff was a young mechanic. The circumstances showed loss much greater than here. Probably through oversight, the excessiveness was not referred to for reversal, counsel having overconfidence in other points. The subject was not passed upon at all. Whether the court would have cut down the amount under other circumstances we can only be of opinion. But it seems quite novel to refer to omission of counsel to bring such a matter to the attention of the court as a precedent to guide judicial footsteps in case of a contest.

Wysocki v. Wisconsin Lakes I. & C. Co. 121 Wis. 96, 98 N. W. 950, was not referred to. There plaintiff lost an eye, his face was badly disfigured, and skull fractured so that part of it, covering the brain, had to be removed. He was confined to his bed some three months and, after a painful partial recovery, he was left a wreck for life. A verdict of $8,000 was sustained. The case was highly extraordinary, the loss of the eye being the smallest part of it.

Now as to foreign precedents,—there are isolated cases of large recoveries, explainable, in general, by special circumstances. Here is about as fair and full a collection of them as can be made: A man, aged thirty-five, able to earn a large salary, lost an eye and had his working capacity reduced one half, was awarded $5,000. *Johnson v. Mo. Pac. R. Co.* 96 Mo. 340. A locomotive engineer from loss of an eye was unable to work for eight months, was put to considerable ex-

pense and disqualified from his occupation, recovered $3,000. *East St. Louis v. Dougherty,* 74 Ill. App. 490. A young man, aged twenty-two, who lost one eye with usual incidents, recovered $2,000. *Lemser v. St. Joseph F. Mfg. Co.* 70 Mo. App. 209. Loss of eyesight by boy of eighteen, in bed six weeks,—in opinion of physician would never be well, $3,000. *New Jersey R. & T. Co. v. West,* 32 N. J. Law, 91. A farmer lost an eye, suffered much pain, and his earning capacity was largely diminished, recovered $5,000. *Texas & P. R. Co. v. Bowlin* (Tex. Civ. App.) 32 S. W. 918. A recovery of $5,000 for such a loss was reduced to $2,000. *Benagam v. Plassan,* 15 La. Ann. 703. Man of twenty-three, for loss of both eyes, recovered $6,000. *Bane v. Irwin,* 172 Mo. 306, 72 S. W. 522. A machinist, thirty-six years old, for like loss recovered $3,300. *Famous Mfg. Co. v. Harmon,* 28 Ind. App. 117, 62 N. E. 306. A boy of eight lost an eye,—recovery $2,500. *Van Camp H. & I. Co. v. O'Brien,* 28 Ind. App. 152, 62 N. E. 464. A blast furnace employee had both eyes seriously impaired,—equivalent to loss of one, his face was very seriously burned and hearing injured. He recovered $1,700. *Ill. S. Co. v. Sitar,* 98 Ill. App. 300, affirmed 199 Ill. 116, 64 N. E. 584. A man of fifty-one, earning a salary of $1,000 per year,—lost one eye, the other was seriously injured so as to render total blindness probable, recovered $12,000. *Cummings v. Nat. & P. W. Mills,* 24 R. I. 390, 53 Atl. 280. A young man of twenty-four lost one eye, his capacity for labor was considerably reduced. He obtained a verdict for $8,000. The amount was said to be excessive beyond anything that could be found, and reduction of $1,000 ordered. *De la Vergne R. M. Co. v. Stahl,* 24 Tex. Civ. App. 471, 60 S. W. 319. Railway mail clerk for loss of an eye recovered $2,500. *Cook v. Mo. Pac. R. Co.* 94 Mo. App. 417, 68 S. W. 230. A man was made blind by an explosion in a stone quarry and was otherwise greatly injured. He obtained a verdict for $9,000 after six trials,

which was said to be large but sustained under the circumstances. *Stearns v. Reidy,* 33 Ill. App. 246, 135 Ill. 119, 25 N. E. 762. A medical student had one eye destroyed, rendering him unable to read with the other eye, destroying his life prospects and causing him intense suffering, recovered $7,500. *Louisville v. Keher,* 117 Ky. 841, 79 S. W. 270. A young man entering upon a career as a mechanic for which he had natural aptitude, lost one eye, causing probable deprivation of life prospects in his chosen field, recovered $5,000. The court, with some hesitation, refused to interfere. *Cleveland, C., C. & St. L. R. Co. v. Tehan,* 26 Ohio Cir. Ct. Rep. 457. A boy sixteen years old, very capable, would have been of capacity to earn $100 per month by his majority, lost sight of one eye. He suffered intensely for months and continued to suffer down to the trial. He recovered $5,000. *Georgia, F. & A. R. Co. v. Lasseter,* 122 Ga. 679, 51 S. E. 15.

With the foregoing recoveries in courts at home and abroad, and the legislative policy in all civilized countries of the world, all the states of our Union where compensation acts have been adopted or proposed, the pending proposed bill in Congress, the schedule of rates for pensions for such losses, and established principles upon which compensation should be based,—we have a demonstration, it seems, that $2,000 to $3,000 for an ordinary case of loss of an eye is about fair. Anything more should challenge close attention, and much more be thought manifestly excessive.

I appreciate the length of this opinion, but think it is justified by the case and the purpose. There should be no thought of punishment in the minds of jurors, permitted to be efficient, as said by this court in *Potter v. C. & N. W. R. Co.* 22 Wis. 615. Evidence to the contrary should receive efficient attention. The sole thought of jurors should be, in case of liability, fair compensation for the loss suffered by the mutual misfortune. The amount of recovery in such

cases is the dominant thing, yet often receives the least attention from defendant's counsel and the courts. That, as it seems, comes from habitually overlooking the Code giving judicial authority, where the old system did not, to guard defendants against spoliation by the sympathy or indignation of jurors overmastering their judgment, or by some other cause.

Is there not need for some halting in the field discussed? Is it not a discredit to our system, as vitalized by the administration of it, when such system is viewed as a science, that it permits a range of recoveries of $2,000 to $7,000 without any very great difference in situations? If so, where is the fault? Is it in the system or in its administration? Is there not room for beneficial change other than by written law? Could there be such a range as suggested without the difficulty being in failure to impress upon juries the true logic of recoverable loss, and giving too much heed to unbridled arbitrary awards under lingering influence of the perversion that the judiciary is practically helpless where the award is not characterized by passion or prejudice? I apprehend that if the trial court had given plaintiff the option to take half the amount of the jury award, or submit to a new trial, the ruling would have received approval here, and that such course would have been taken if the scope of judicial authority under the Code had been fully appreciated.

VINJE, J. I concur in the foregoing opinion by Mr. Justice MARSHALL.

VON OEHSEN, Executor, Respondent, vs. BROWN and others, Appellants.

January 12—January 30, 1912.

Mortgages: Deed and agreement to reconvey: Pleading: Cause of action: Foreclosure.

A conveyance of land subject to an existing mortgage to the grantee, and an agreement to reconvey upon payment of all the interest on that mortgage and certain other sums, were themselves, taken together, a mortgage; and in an action by the representative of the grantee named in the conveyance for strict foreclosure of the agreement to reconvey, the complaint, alleging that the interest on the mortgage first mentioned remains due and unpaid, is *held* to state a cause of action, not for strict foreclosure, but for a statutory foreclosure for such interest. A general demurrer to the complaint was therefore properly overruled, under sec. 2649*a*, Stats. (Laws of 1911, ch. 354).

APPEAL from an order of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

The complaint, after stating that John F. Miles died testate, and that plaintiff was duly appointed and has qualified as executor, alleges:

"That on or about the 4th day of February, 1908, at the city of Platteville, Grant county, Wisconsin, the said above named John F. Miles, deceased, and the above named defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, of the city of Platteville, Grant county, Wisconsin, made and entered into certain articles of agreement, in writing, under their hands and seals, and bearing date the 4th day of February, 1908, for the sale and conveyance, by the said John F. Miles, deceased, to the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, of the land hereinafter described, a true copy of which said articles of agreement is hereto attached and made a part hereof and marked 'Exhibit A.' By said articles of agreement the said John F. Miles, deceased, in consideration of the payment to him of the claim for mechanic's lien filed

by J. O. Hughes & Son, contractors, against the property and real estate hereinafter described; also the payment of the claim for mechanic's lien filed by the Freeport Gas Machine Company against said hereinafter described property; also all of the interest in full on a certain mortgage for $10,000, executed on the 11th day of December, 1906, by the said defendants, *George M. Brown, Mary T. Brown,* his wife, and to the said John F. Miles, deceased, and covering all of lot 10 of the original plat of the city of Platteville, Grant county, Wisconsin, according to the recorded map and plat thereof, except sixteen feet off from the north end of said lot; also all taxes and insurance upon all of the real estate and premises hereinafter described, all of which sums were to have been paid by the said defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, to the said John F. Miles, deceased. And upon the full and complete payment of all of said claim and sums hereinbefore enumerated, the said John F. Miles, deceased, promised and agreed to and with the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, after and upon condition of the prompt and full performance by the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, of all their agreements in said articles of agreement, to convey by good and sufficient deed to the said defendant *George M. Brown,* all of the following described lands and premises, to wit: Lot 10 of the original plat of the village (now city) of Platteville, Grant county, Wisconsin, except sixteen feet off from north end thereof, subject to the said mortgage of $10,000, hereinbefore described; also those certain lands in the Homestead Addition to the city of Platteville, Grant county, Wisconsin, heretofore conveyed to the said *George M. Brown* by William Wallers and wife; that in and by said articles of agreement the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, in consideration of the payment of the said mechanics' liens hereinbefore described, by the said John F. Miles, deceased, covenanted, promised, and agreed to and with the said John F. Miles, deceased, to well and truly pay, or cause to be paid, within one year from the date of said articles of agreement, to the said John F. Miles, deceased, all sums which he would be required to pay in order to settle the said claims for me-

chanics' liens, and also to pay him all of the interest in full, upon the said mortgage of $10,000; also to pay all taxes and insurance upon said above described property; that in and by said articles of agreement it was further understood and agreed by the parties thereto, that in the event of the failure of the said party of the second part to pay the various sums hereinbefore set forth, one year from the date of said articles of agreement, that they should forfeit forever all of the right, title, and interest in and to the said lands and premises hereinbefore described, and should vacate said lands and premises without further action on the part of the said John F. Miles, deceased; that said articles of agreement were duly executed by the said John F. Miles, deceased, and *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, defendants, and the execution thereof duly acknowledged, so as to entitle the same to be recorded in the office of the register of deeds of Grant county, Wisconsin, and said contract was on the 5th day of February, 1908, at 3 o'clock p. m., recorded in volume 162 of deeds, page 506, in said office of said register of deeds.

"And plaintiff further shows to the court and alleges that at the time of making said articles of agreement the said John F. Miles, deceased, was the owner of said lands and premises, and that said lands and premises are now a portion of the estate of John F. Miles, deceased, and that upon the execution and delivery of the said articles of agreement the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, went into the occupancy of said lands and premises under and by virtue of said articles of agreement and not otherwise. And the plaintiff further shows that the said defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, have failed to comply with their agreements in said articles of agreement contained, by neglecting and refusing to pay the said claim of J. O. Hughes & Son for lien, which plaintiff alleges amount to $3,390.20 on said February 4, 1908; by neglecting and failing to pay the claim for lien of the Freeport Gas Machine Company, which said claim on February 4, 1908, amounted to $279.95; by neglecting and failing to pay any insurance upon said above described real estate, and that there is now due, according to said articles of agreement, the sum of

$3,390.20 and interest thereon at the rate of six per cent. per annum from February 4, 1909; the sum of $279.95 and interest thereon at the rate of six per cent. per annum from February 4, 1909; the interest on the $10,000 mortgage from December 11, 1906, at the rate of six per cent., less the sum of $300 interest which was paid June 11, 1907; the taxes on said real estate and premises, amounting to $1,010.39; the sewerage taxes, amounting to $332.84; insurance upon said real estate and premises, amounting to $——; that the said defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, have neglected and failed to pay any of the aforesaid sums, or any interest thereon; that the plaintiff, as such executor of the last will and testament of said John F. Miles, under and by virtue of said last will and testament of said John F. Miles, deceased, is entitled to the possession of all the real estate and premises belonging to the estate of the said John F. Miles, deceased.

"Wherefore the plaintiff demands judgment that the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, and all persons claiming under them by virtue of said articles of agreement, be adjudged to have abandoned and given up all right, title, and interest in and to the lands and premises described in said articles of agreement, and all right of action upon or growing out of the same, and that the defendants be forever debarred and foreclosed of and from all right and claim to said premises, and that the plaintiff recover speedy possession of said premises and the appurtenances, and that he recover from the said defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, his costs and disbursements in this action."

Exhibit A referred to was duly signed, witnessed, and acknowledged, and reads as follows:

"This agreement, made and concluded this 4th day of February, 1908, by and between John F. Miles, of the city of Platteville, Grant county, Wisconsin, party of the first part, and *George M. Brown, Mary T. Brown,* his wife, and James Brown, of the city of Platteville, Grant county, Wisconsin, parties of the second part, witnesseth: that whereas the said parties of the second part have this day executed and

delivered unto the said party of the first part a deed to all of lot 10 of the original plat of the village (now city) of Platteville, Grant county, Wisconsin, excepting sixteen feet off the north end thereof, subject to a mortgage of $10,000 now existing upon the said lands and premises in favor of the said party of the first part; and have also executed and delivered to the said party of the first part a deed to all of those certain lots in the Homestead Addition to the city of Platteville, Grant county, Wisconsin, heretofore conveyed to the said *George M. Brown* by William Wallers and wife; as a consideration therefor the said party of the first part agrees to pay or take up the claim for mechanic's lien filed by J. O. Hughes & Son, contractors, against the said property, and also to pay or take up the claim for mechanic's lien filed by the Freeport Gas Machine Company.

"Now, therefore, if the said parties of the second part shall repay to the said party of the first part, within one year from this date, all money which he shall be required to pay in order to settle the said claims for mechanics' liens filed against the said property, and shall also pay to him all of his interest in full upon the said mortgage of $10,000, and shall also pay all taxes and insurance upon said above described property, then and in that case the said party of the first part agrees to reconvey the said lands and premises, subject to his said mortgage of $10,000, to the said *George M. Brown.* And in the event of the failure of the said parties of the second part to pay the various sums heretofore set forth, one year from date hereof, they shall forever forfeit all right, title, and interest in and to the lands and premises herein described, and shall vacate the said lands and premises without further action on the part of the party of the first part."

The defendants entered a general demurrer to the complaint and from an order overruling the same they appealed.

For the appellants there was a brief by *Kopp & Brunckhorst,* and oral argument by *L. A. Brunckhorst.*

D. J. Gardner, for the respondent.

VINJE, J. The agreement Exhibit A shows that the deed, executed at the same time, was in fact a mortgage given to

secure the interest due or to become due on the $10,000 mortgage and the sums to be advanced by Miles to pay claims for mechanics' liens, taxes, and insurance. Even if the complaint be construed as containing no specific allegations that Miles or the plaintiff paid the claims for mechanics' liens, it does allege that interest on the $10,000 mortgage remains unpaid and is now due. The deed being in fact a mortgage, plaintiff is not entitled to a strict foreclosure, but he has stated a cause of action for a statutory foreclosure for at least the interest due on the $10,000 mortgage which the deed was given to secure, and the demurrer was therefore properly overruled. Sec. 2649*a*, Stats. (Laws of 1911, ch. 354).

By the Court.—Order affirmed.

PLATTEVILLE LEAD & ZINC COMPANY, Respondent, vs. HILL, Appellant.

January 12—January 30, 1912.

Landlord and tenant: Mining lease: Consideration: Title to ores not in lessor: Surface rights: Demurrer.

In an action to recover moneys paid as royalties under a mining lease, on the ground that the lessor had no title to the ores and plaintiff had been obliged to pay royalties also to the true owner thereof, a demurrer to the complaint, overruled by the trial court on the ground that it appeared from the allegations that the lease was without consideration and void, should have been sustained because the complaint shows that surface rights belonging to the lessor were included in the lease and, for aught that appears, the use of such rights may have been adequate consideration.

APPEAL from an order of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action to recover money paid under a lease. The complaint alleges, in substance, that on November 8, 1905, plaintiff obtained from defendant a mining lease on a certain de-

scribed parcel of land containing about an acre; that it began mining operations thereon on and prior to November 8, 1905, and continued to mine in and upon said land until on and after July 27, 1906, and extracted large quantities of ore, on which it paid as royalties to the defendant the total sum of $721.15 in various sums and at various dates; that on April 1, 1909, plaintiff discovered that the right to the ores was in the heirs at law of one John H. Rountree, deceased, under a reservation in a deed duly executed and recorded by said Rountree in 1855, as follows: "Reserving and withholding all the mineral ores and the right to work the same on the said land, not disturbing the surface thereof;" that said reservation was included in a deed of the premises to defendant's father; that on the 22d day of April, 1909, plaintiff was obliged to pay the sum of $721.15 to the heirs at law of said Rountree, deceased, so paid to the defendant by mistake and wrongfully retained by him. And upon information and belief it alleges that the heirs at law of said Rountree are the owners of said minerals and mining rights in and upon said land, and that said defendant at all times knew that fact; that it has demanded a return of the money paid him, but that he has refused to repay said sum of $721.15 so paid him by mistake of this plaintiff and so wrongfully withheld by him, and that he wrongfully withholds the same and the whole thereof; and prays for judgment for the sum of $721.15 with interest. The defendant interposed a general demurrer, and appealed from an order overruling the same.

For the appellant there was a brief by *Kopp & Brunckhorst,* and oral argument by *L. A. Brunckhorst.*

For the respondent there was a brief by *Gardner & Gardner,* and the cause was argued orally by *D. J. Gardner* and *David Gardner, Jr.*

VINJE, J. The trial court overruled the demurrer on the ground that it appeared upon the face of the complaint that

there was no consideration for the lease, and that it was void because both parties contracted with reference to a subject matter that did not exist, namely, the ownership by the defendant of the ores in the ground. Were the case to be disposed of on this theory, several interesting questions would arise for determination. There is no allegation in the complaint that the relation of landlord and tenant has terminated. That being so, can the tenant question the landlord's title? There is no allegation of an eviction by a paramount title. There is no allegation that plaintiff was compelled by a court of competent jurisdiction to pay royalties to the heirs at law of Rountree. There is no allegation of false or fraudulent representations by defendant, and none of a *mutual* mistake. The case of *Bedell v. Wilder,* 65 Vt. 406, 26 Atl. 589, relied upon by the court below, went partly upon the ground that the landlord agreed to repay the rent reserved in a lease of water power if the tenant was obliged to pay it to a third party. He was compelled to do so by a decision of the supreme court of the state, and, as there was no other consideration for the lease than the use of the water power, there was a total failure of consideration, resulting, as the court found, from a mutual mistake of the parties, and the recovery was had upon the ground of mutual mistake, failure of consideration, and the promise to repay.

In the case at bar the complaint shows upon its face that there was some consideration for the lease, for it shows that the surface rights were in defendant and that they were included in the mining lease. The complaint alleges plaintiff began to mine in and *upon* the leased premises and continued to do so until on and *after* July 27, 1906. For aught the complaint informs us, the use of the surface rights may have been an adequate consideration for the lease. It must be deemed so upon demurrer.

By the Court.—Order reversed, and cause remanded for further proceedings according to law.

VON OEHSEN, Executor, Respondent, vs. BROWN and others, Appellants.

January 12—January 30, 1912.

Mortgages: Deed and agreement to reconvey: Pleading: Cause of action: Foreclosure.

A conveyance of land subject to an existing mortgage to the grantee, and an agreement to reconvey upon payment of all the interest on that mortgage and certain other sums, were themselves, taken together, a mortgage; and in an action by the representative of the grantee named in the conveyance for strict foreclosure of the agreement to reconvey, the complaint, alleging that the interest on the mortgage first mentioned remains due and unpaid, is *held* to state a cause of action, not for strict foreclosure, but for a statutory foreclosure for such interest. A general demurrer to the complaint was therefore properly overruled, under sec. 2649*a*, Stats. (Laws of 1911, ch. 354).

APPEAL from an order of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

The complaint, after stating that John F. Miles died testate, and that plaintiff was duly appointed and has qualified as executor, alleges:

"That on or about the 4th day of February, 1908, at the city of Platteville, Grant county, Wisconsin, the said above named John F. Miles, deceased, and the above named defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, of the city of Platteville, Grant county, Wisconsin, made and entered into certain articles of agreement, in writing, under their hands and seals, and bearing date the 4th day of February, 1908, for the sale and conveyance, by the said John F. Miles, deceased, to the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, of the land hereinafter described, a true copy of which said articles of agreement is hereto attached and made a part hereof and marked 'Exhibit A.' By said articles of agreement the said John F. Miles, deceased, in consideration of the payment to him of the claim for mechanic's lien filed

by J. O. Hughes & Son, contractors, against the property and real estate hereinafter described; also the payment of the claim for mechanic's lien filed by the Freeport Gas Machine Company against said hereinafter described property; also all of the interest in full on a certain mortgage for $10,000, executed on the 11th day of December, 1906, by the said defendants, *George M. Brown, Mary T. Brown,* his wife, and to the said John F. Miles, deceased, and covering all of lot 10 of the original plat of the city of Platteville, Grant county, Wisconsin, according to the recorded map and plat thereof, except sixteen feet off from the north end of said lot; also all taxes and insurance upon all of the real estate and premises hereinafter described, all of which sums were to have been paid by the said defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, to the said John F. Miles, deceased. And upon the full and complete payment of all of said claim and sums hereinbefore enumerated, the said John F. Miles, deceased, promised and agreed to and with the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, after and upon condition of the prompt and full performance by the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, of all their agreements in said articles of agreement, to convey by good and sufficient deed to the said defendant *George M. Brown,* all of the following described lands and premises, to wit: Lot 10 of the original plat of the village (now city) of Platteville, Grant county, Wisconsin, except sixteen feet off from north end thereof, subject to the said mortgage of $10,000, hereinbefore described; also those certain lands in the Homestead Addition to the city of Platteville, Grant county, Wisconsin, heretofore conveyed to the said *George M. Brown* by William Wallers and wife; that in and by said articles of agreement the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, in consideration of the payment of the said mechanics' liens hereinbefore described, by the said John F. Miles, deceased, covenanted, promised, and agreed to and with the said John F. Miles, deceased, to well and truly pay, or cause to be paid, within one year from the date of said articles of agreement, to the said John F. Miles, deceased, all sums which he would be required to pay in order to settle the said claims for me-

chanics' liens, and also to pay him all of the interest in full, upon the said mortgage of $10,000; also to pay all taxes and insurance upon said above described property; that in and by said articles of agreement it was further understood and agreed by the parties thereto, that in the event of the failure of the said party of the second part to pay the various sums hereinbefore set forth, one year from the date of said articles of agreement, that they should forfeit forever all of the right, title, and interest in and to the said lands and premises hereinbefore described, and should vacate said lands and premises without further action on the part of the said John F. Miles, deceased; that said articles of agreement were duly executed by the said John F. Miles, deceased, and *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, defendants, and the execution thereof duly acknowledged, so as to entitle the same to be recorded in the office of the register of deeds of Grant county, Wisconsin, and said contract was on the 5th day of February, 1908, at 3 o'clock p. m., recorded in volume 162 of deeds, page 506, in said office of said register of deeds.

"And plaintiff further shows to the court and alleges that at the time of making said articles of agreement the said John F. Miles, deceased, was the owner of said lands and premises, and that said lands and premises are now a portion of the estate of John F. Miles, deceased, and that upon the execution and delivery of the said articles of agreement the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, went into the occupancy of said lands and premises under and by virtue of said articles of agreement and not otherwise. And the plaintiff further shows that the said defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, have failed to comply with their agreements in said articles of agreement contained, by neglecting and refusing to pay the said claim of J. O. Hughes & Son for lien, which plaintiff alleges amount to $3,390.20 on said February 4, 1908; by neglecting and failing to pay the claim for lien of the Freeport Gas Machine Company, which said claim on February 4, 1908, amounted to $279.95; by neglecting and failing to pay any insurance upon said above described real estate, and that there is now due, according to said articles of agreement, the sum of

$3,390.20 and interest thereon at the rate of six per cent. per annum from February 4, 1909; the sum of $279.95 and interest thereon at the rate of six per cent. per annum from February 4, 1909; the interest on the $10,000 mortgage from December 11, 1906, at the rate of six per cent., less the sum of $300 interest which was paid June 11, 1907; the taxes on said real estate and premises, amounting to $1,010.39; the sewerage taxes, amounting to $332.84; insurance upon said real estate and premises, amounting to $——; that the said defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, have neglected and failed to pay any of the aforesaid sums, or any interest thereon; that the plaintiff, as such executor of the last will and testament of said John F. Miles, under and by virtue of said last will and testament of said John F. Miles, deceased, is entitled to the possession of all the real estate and premises belonging to the estate of the said John F. Miles, deceased.

"Wherefore the plaintiff demands judgment that the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, and all persons claiming under them by virtue of said articles of agreement, be adjudged to have abandoned and given up all right, title, and interest in and to the lands and premises described in said articles of agreement, and all right of action upon or growing out of the same, and that the defendants be forever debarred and foreclosed of and from all right and claim to said premises, and that the plaintiff recover speedy possession of said premises and the appurtenances, and that he recover from the said defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, his costs and disbursements in this action."

Exhibit A referred to was duly signed, witnessed, and acknowledged, and reads as follows:

"This agreement, made and concluded this 4th day of February, 1908, by and between John F. Miles, of the city of Platteville, Grant county, Wisconsin, party of the first part, and *George M. Brown, Mary T. Brown,* his wife, and James Brown, of the city of Platteville, Grant county, Wisconsin, parties of the second part, witnesseth: that whereas the said parties of the second part have this day executed and

VON OEHSEN, Executor, Respondent, vs. BROWN and others, Appellants.

January 12—January 30, 1912.

Mortgages: Deed and agreement to reconvey: Pleading: Cause of action: Foreclosure.

A conveyance of land subject to an existing mortgage to the grantee, and an agreement to reconvey upon payment of all the interest on that mortgage and certain other sums, were themselves, taken together, a mortgage; and in an action by the representative of the grantee named in the conveyance for strict foreclosure of the agreement to reconvey, the complaint, alleging that the interest on the mortgage first mentioned remains due and unpaid, is *held* to state a cause of action, not for strict foreclosure, but for a statutory foreclosure for such interest. A general demurrer to the complaint was therefore properly overruled, under sec. 2649*a*, Stats. (Laws of 1911, ch. 354).

APPEAL from an order of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

The complaint, after stating that John F. Miles died testate, and that plaintiff was duly appointed and has qualified as executor, alleges:

"That on or about the 4th day of February, 1908, at the city of Platteville, Grant county, Wisconsin, the said above named John F. Miles, deceased, and the above named defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, of the city of Platteville, Grant county, Wisconsin, made and entered into certain articles of agreement, in writing, under their hands and seals, and bearing date the 4th day of February, 1908, for the sale and conveyance, by the said John F. Miles, deceased, to the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, of the land hereinafter described, a true copy of which said articles of agreement is hereto attached and made a part hereof and marked 'Exhibit A.' By said articles of agreement the said John F. Miles, deceased, in consideration of the payment to him of the claim for mechanic's lien filed

by J. O. Hughes & Son, contractors, against the property and real estate hereinafter described; also the payment of the claim for mechanic's lien filed by the Freeport Gas Machine Company against said hereinafter described property; also all of the interest in full on a certain mortgage for $10,000, executed on the 11th day of December, 1906, by the said defendants, *George M. Brown, Mary T. Brown,* his wife, and to the said John F. Miles, deceased, and covering all of lot 10 of the original plat of the city of Platteville, Grant county, Wisconsin, according to the recorded map and plat thereof, except sixteen feet off from the north end of said lot; also all taxes and insurance upon all of the real estate and premises hereinafter described, all of which sums were to have been paid by the said defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, to the said John F. Miles, deceased. And upon the full and complete payment of all of said claim and sums hereinbefore enumerated, the said John F. Miles, deceased, promised and agreed to and with the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, after and upon condition of the prompt and full performance by the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, of all their agreements in said articles of agreement, to convey by good and sufficient deed to the said defendant *George M. Brown,* all of the following described lands and premises, to wit: Lot 10 of the original plat of the village (now city) of Platteville, Grant county, Wisconsin, except sixteen feet off from north end thereof, subject to the said mortgage of $10,000, hereinbefore described; also those certain lands in the Homestead Addition to the city of Platteville, Grant county, Wisconsin, heretofore conveyed to the said *George M. Brown* by William Wallers and wife; that in and by said articles of agreement the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, in consideration of the payment of the said mechanics' liens hereinbefore described, by the said John F. Miles, deceased, covenanted, promised, and agreed to and with the said John F. Miles, deceased, to well and truly pay, or cause to be paid, within one year from the date of said articles of agreement, to the said John F. Miles, deceased, all sums which he would be required to pay in order to settle the said claims for me-

chanics' liens, and also to pay him all of the interest in full, upon the said mortgage of $10,000; also to pay all taxes and insurance upon said above described property; that in and by said articles of agreement it was further understood and agreed by the parties thereto, that in the event of the failure of the said party of the second part to pay the various sums hereinbefore set forth, one year from the date of said articles of agreement, that they should forfeit forever all of the right, title, and interest in and to the said lands and premises hereinbefore described, and should vacate said lands and premises without further action on the part of the said John F. Miles, deceased; that said articles of agreement were duly executed by the said John F. Miles, deceased, and *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, defendants, and the execution thereof duly acknowledged, so as to entitle the same to be recorded in the office of the register of deeds of Grant county, Wisconsin, and said contract was on the 5th day of February, 1908, at 3 o'clock p. m., recorded in volume 162 of deeds, page 506, in said office of said register of deeds.

"And plaintiff further shows to the court and alleges that at the time of making said articles of agreement the said John F. Miles, deceased, was the owner of said lands and premises, and that said lands and premises are now a portion of the estate of John F. Miles, deceased, and that upon the execution and delivery of the said articles of agreement the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, went into the occupancy of said lands and premises under and by virtue of said articles of agreement and not otherwise. And the plaintiff further shows that the said defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, have failed to comply with their agreements in said articles of agreement contained, by neglecting and refusing to pay the said claim of J. O. Hughes & Son for lien, which plaintiff alleges amount to $3,390.20 on said February 4, 1908; by neglecting and failing to pay the claim for lien of the Freeport Gas Machine Company, which said claim on February 4, 1908, amounted to $279.95; by neglecting and failing to pay any insurance upon said above described real estate, and that there is now due, according to said articles of agreement, the sum of

$3,390.20 and interest thereon at the rate of six per cent. per annum from February 4, 1909; the sum of $279.95 and interest thereon at the rate of six per cent. per annum from February 4, 1909; the interest on the $10,000 mortgage from December 11, 1906, at the rate of six per cent., less the sum of $300 interest which was paid June 11, 1907; the taxes on said real estate and premises, amounting to $1,010.39; the sewerage taxes, amounting to $332.84; insurance upon said real estate and premises, amounting to $——; that the said defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, have neglected and failed to pay any of the aforesaid sums, or any interest thereon; that the plaintiff, as such executor of the last will and testament of said John F. Miles, under and by virtue of said last will and testament of said John F. Miles, deceased, is entitled to the possession of all the real estate and premises belonging to the estate of the said John F. Miles, deceased.

"Wherefore the plaintiff demands judgment that the defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, and all persons claiming under them by virtue of said articles of agreement, be adjudged to have abandoned and given up all right, title, and interest in and to the lands and premises described in said articles of agreement, and all right of action upon or growing out of the same, and that the defendants be forever debarred and foreclosed of and from all right and claim to said premises, and that the plaintiff recover speedy possession of said premises and the appurtenances, and that he recover from the said defendants, *George M. Brown* and *Mary T. Brown,* his wife, and James M. Brown, his costs and disbursements in this action."

Exhibit A referred to was duly signed, witnessed, and acknowledged, and reads as follows:

"This agreement, made and concluded this 4th day of February, 1908, by and between John F. Miles, of the city of Platteville, Grant county, Wisconsin, party of the first part, and *George M. Brown, Mary T. Brown,* his wife, and James Brown, of the city of Platteville, Grant county, Wisconsin, parties of the second part, witnesseth: that whereas the said parties of the second part have this day executed and

delivered unto the said party of the first part a deed to all of lot 10 of the original plat of the village (now city) of Platteville, Grant county, Wisconsin, excepting sixteen feet off the north end thereof, subject to a mortgage of $10,000 now existing upon the said lands and premises in favor of the said party of the first part; and have also executed and delivered to the said party of the first part a deed to all of those certain lots in the Homestead Addition to the city of Platteville, Grant county, Wisconsin, heretofore conveyed to the said *George M. Brown* by William Wallers and wife; as a consideration therefor the said party of the first part agrees to pay or take up the claim for mechanic's lien filed by J. O. Hughes & Son, contractors, against the said property, and also to pay or take up the claim for mechanic's lien filed by the Freeport Gas Machine Company.

"Now, therefore, if the said parties of the second part shall repay to the said party of the first part, within one year from this date, all money which he shall be required to pay in order to settle the said claims for mechanics' liens filed against the said property, and shall also pay to him all of his interest in full upon the said mortgage of $10,000, and shall also pay all taxes and insurance upon said above described property, then and in that case the said party of the first part agrees to reconvey the said lands and premises, subject to his said mortgage of $10,000, to the said *George M. Brown.* And in the event of the failure of the said parties of the second part to pay the various sums heretofore set forth, one year from date hereof, they shall forever forfeit all right, title, and interest in and to the lands and premises herein described, and shall vacate the said lands and premises without further action on the part of the party of the first part."

The defendants entered a general demurrer to the complaint and from an order overruling the same they appealed.

For the appellants there was a brief by *Kopp & Brunckhorst,* and oral argument by *L. A. Brunckhorst.*

D. J. Gardner, for the respondent.

VINJE, J. The agreement Exhibit A shows that the deed, executed at the same time, was in fact a mortgage given to

secure the interest due or to become due on the $10,000 mortgage and the sums to be advanced by Miles to pay claims for mechanics' liens, taxes, and insurance. Even if the complaint be construed as containing no specific allegations that Miles or the plaintiff paid the claims for mechanics' liens, it does allege that interest on the $10,000 mortgage remains unpaid and is now due. The deed being in fact a mortgage, plaintiff is not entitled to a strict foreclosure, but he has stated a cause of action for a statutory foreclosure for at least the interest due on the $10,000 mortgage which the deed was given to secure, and the demurrer was therefore properly overruled. Sec. 2649*a*, Stats. (Laws of 1911, ch. 354).

By the Court.—Order affirmed.

PLATTEVILLE LEAD & ZINC COMPANY, Respondent, vs. HILL, Appellant.

January 12—January 30, 1912.

Landlord and tenant: Mining lease: Consideration: Title to ores not in lessor: Surface rights: Demurrer.

In an action to recover moneys paid as royalties under a mining lease, on the ground that the lessor had no title to the ores and plaintiff had been obliged to pay royalties also to the true owner thereof, a demurrer to the complaint, overruled by the trial court on the ground that it appeared from the allegations that the lease was without consideration and void, should have been sustained because the complaint shows that surface rights belonging to the lessor were included in the lease and, for aught that appears, the use of such rights may have been adequate consideration.

APPEAL from an order of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action to recover money paid under a lease. The complaint alleges, in substance, that on November 8, 1905, plaintiff obtained from defendant a mining lease on a certain de-

STRAIT, Respondent, vs. NORTHWESTERN STEEL & IRON WORKS, Appellant.

January 13—January 30, 1912.

Corporations: Contract made by president: Ratification: Payment for property in stock: Agreement to repurchase stock: Breach: Tender: Measure of damages.

1. Where the president of defendant corporation conducted all the negotiations which resulted in the transfer by plaintiff to the corporation of personal property at the price of $5,000, to be paid in stock of the corporation, and the engagement of plaintiff at a salary so long as his services should be satisfactory, with a further agreement to buy back his stock at par in case of his being discharged, the defendant, which approved such agreement and accepted and ratified the fruits of the negotiations, thereby ratified the acts of its president; and it, not the president personally, was bound by such agreement to repurchase the stock.
2. After defendant had agreed to the price and salary named by plaintiff, the latter wired "Will accept and do my best, with the understanding you take my stock at par in case you wish me to retire," to which defendant replied, "Consider deal closed." *Held*, that this constituted a binding agreement to take plaintiff's stock off his hands at par in case of his discharge from defendant's employ.
3. Plaintiff having by letter offered to return the stock and demanded his money, and having afterwards, before suit, tendered the certificates of stock properly indorsed, which offer and tender were refused, his acts were the equivalent of actual delivery and entitled him to treat the contract as performed on his part and to sue for and recover the face of the certificates.

APPEAL from a judgment of the circuit court for Eau Claire county: A. J. VINJE, Judge. *Affirmed.*

The complaint sets out two causes of action. The first alleges that the plaintiff, prior to February 20, 1907, was engaged in the manufacture of agricultural and other machinery at Elmira, New York, and that the defendant was similarly engaged at Eau Claire, Wisconsin. It is alleged that the defendant, desirous of enlarging its plant, agreed to pur-

chase personal property from the plaintiff of a schedule value of more than $11,000, the consideration to be paid therefor being corporate stock of the defendant to the amount of $5,000 and an agreement to employ the plaintiff at a salary of $100 per month as long as his services were satisfactory, and the additional agreement, in the event of the plaintiff's services being unsatisfactory or of his being discharged, that the defendant would take back the stock and in lieu thereof pay the plaintiff for said personal property the sum of $5,000. It is alleged that about April 1, 1908, after having been employed by the defendant for about a year, the plaintiff was discharged from the employ of the defendant because his services were unsatisfactory, that the plaintiff offered to return the stock certificates and demanded the $5,000 from the defendant, and that the defendant has refused to pay the $5,000.

The second cause of action alleged is for recovery of $12,000, the alleged value of the personal property sold by the plaintiff to the defendant.

The answer admits the agreement to purchase the personal property from the plaintiff and the paying therefor by $5,000 worth of stock; denies that there was an agreement to take back the stock at par in the event of the plaintiff's discharge from defendant's employ as unsatisfactory; and sets up a counterclaim for the salary paid the plaintiff, on the ground that his services were valueless to the defendant, a counterclaim for alleged large expenditures made necessary to avoid paying royalties to the plaintiff and his wife upon patents which they claimed to hold and which covered implements for the manufacture of which the property purchased from the plaintiff was solely adapted, and a further counterclaim based on the ground that the defendant had been compelled to make large expenditures because the plaintiff, by using the machinery and time of the defendant, had obtained patents upon implements for the manufacture of which the machines

owned by it were solely adapted, and because it became necessary for the defendant to expend large sums of money in designing and making new implements and machinery to manufacture a line of goods not covered by the plaintiff's patents.

The evidence shows that as the result of correspondence between the parties the plaintiff visited Eau Claire in the early part of February, 1907, and inspected the plant of the defendant. On February 6 or 7, 1907, the president of the defendant corporation visited the plaintiff's place of business at Elmira, New York, inspected the personal property, made inquiries about the business, and, after his return to Eau Claire, wrote to the plaintiff on February 11, 1907, offering $5,000 for the plaintiff's personal property, to be paid in stock of the defendant corporation, promising the plaintiff employment if he accepted the offer, and asking the plaintiff to wire if he accepted the offer.

The plaintiff on February 13, 1907, sent to the defendant the following telegraphic message: "With matters more definitely understood, probably can get together. Writing;" and in the letter stated: "As we talked, we think we ought to be worth $1,200 per year if anything, and if it should appear later on that *Mr. Strait's* services were not satisfactory to the company, and you wished him to step aside, we would like to have it arranged so that you would take our stock off our hands at the sacrifice price that we consider we are putting our appliances in for." The defendant in reply wrote: "As to your salary, $100 a month, I think, would be satisfactory to our people," and asked the plaintiff to wire as to some details. That part of the plaintiff's answer relative to the matters involved in the instant case was as follows: "Will accept, and do my best, with understanding you take our stock at par if you wish me to retire."

On February 20, 1907, the defendant wired the plaintiff as follows: "Consider deal closed. When can you start? Considerable business in sight already," and also wrote him

a letter in which the repurchase of the stock was spoken of as not advisable. On the day the plaintiff received defendant's telegram he telegraphed the defendant as follows: "Telegram received. Will pull up and move at once." The plaintiff packed up the property thus sold to the defendant and arrived with it at Eau Claire, received his certificates of stock, and went to work for the defendant. About a year later the defendant notified him that his services were unsatisfactory. Plaintiff then offered to turn over his stock and demanded $5,000 for it. This was refused, and after negotiations for a settlement had failed the plaintiff brought action.

The court granted plaintiff's motion that a verdict be directed in his favor as to defendant's counterclaims; denied defendant's motion that a verdict be directed in its favor dismissing the plaintiff's cause of action as alleged in his complaint; and granted plaintiff's motion that a verdict be directed in his favor on his first cause of action. This is an appeal from the judgment in accord with the verdict.

For the appellant there was a brief by *Bundy & Wilcox,* and oral argument by *C. T. Bundy.* They cited *Moench v. Hower,* 137 Iowa, 621, 115 N. W. 229; *Erie City Iron Works v. Thomas,* 139 Fed. 995; *Calteaux v. Mueller,* 102 Wis. 525, 78 N. W. 1082; *Atlanta & W. B. & C. Asso. v. Smith,* 141 Wis. 377, 123 N. W. 106; *Tolman v. New Mexico & D. M. Co.* 4 Dak. 4, 22 N. W. 505; *Watters v. McGuigan,* 72 Wis. 155, 39 N. W. 382; *Hicks P. Co. v. Wis. Cent. R. Co.* 138 Wis. 584, 120 N. W. 512; *Gehl v. Milwaukee P. Co.* 105 Wis. 573, 81 N. W. 666; *Woodman v. Blue Grass L. Co.* 125 Wis. 489, 103 N. W. 236, 104 N. W. 920; *Lincoln v. Charles Alshuler Mfg. Co.* 142 Wis. 475, 125 N. W. 908.

For the respondent there was a brief by *Sturdevant & Farr,* and oral argument by *L. M. Sturdevant.* They cited, besides other cases, 3 Cook, Corp. (6th ed.) § 716, pp. 2290, 2291;

Sprague C. M. Co. v. Fuller, 158 Fed. 588; *Pittsburgh, C. & St. L. R. Co. v. Keokuk & H. B. Co.* 131 U. S. 371, 9 Sup. Ct. 770; *Milwaukee T. Co. v. Van Valkenburgh,* 132 Wis. 638, 112 N. W. 1083; *Northwestern F. Co. v. Lee,* 102 Wis. 426, 78 N. W. 584; *Haynes v. Kenosha E. R. Co.* 139 Wis. 227, 241, 119 N. W. 568, 121 N. W. 124; *Curtis L. & L. Co. v. Interior L. Co.* 137 Wis. 341, 118 N. W. 853; *Vent v. Duluth C. & S. Co.* 64 Minn. 307, 67 N. W. 70; *Browne v. St. Paul P. Works,* 62 Minn. 90, 64 N. W. 66; *Ophir C. M. Co. v. Brynteson,* 143 Fed. 829; *Gilchrist v. Highfield,* 140 Wis. 476, 123 N. W. 102; *Atlanta & W. B. & C. Asso. v. Smith,* 141 Wis. 377, 123 N. W. 106.

SIEBECKER, J. The defendant contends that the court erred in holding, as a matter of law, that the negotiations between the plaintiff and the defendant's president, Mr. Rosholt, resulted in an agreement whereby defendant obligated itself to pay plaintiff $5,000 in cash for the $5,000 worth of shares of the defendant's corporate stock held by him. The contention is based on two grounds: (1) that the negotiations fail to establish any such agreement, and (2) that if such an agreement was made it was a personal agreement between the plaintiff and Mr. Rosholt, defendant's president, and hence created no obligation of the defendant corporation. The evidence shows that Mr. Rosholt, the president of the defendant corporation, conducted all the negotiations with the plaintiff through which the defendant acquired the personal property of the plaintiff's company, upon the terms and conditions under which the defendant accepted and now holds it, and the terms of plaintiff's employment by defendant. These agreements were approved on defendant's part and accepted by it. Under these circumstances Rosholt's authority to act for defendant in all matters embraced in such negotiations cannot be questioned. These transactions establish the fact that Rosholt had authority to contract for a transfer of plaint-

iff's personal property to the defendant, to employ him for the defendant, and to agree upon the terms of the transactions, as held by the court. It is clearly shown that defendant accepted and retained the fruits of his negotiations with the plaintiff and fully ratified his agreements. It must therefore be held that none of such agreements were the personal agreements of Rosholt and that they were in fact made by him as the agent of the defendant.

The offer by the defendant to purchase plaintiff's personal property and to employ him in the defendant's business at $100 per month was accepted by the plaintiff "with the understanding" that defendant would take plaintiff's stock "at par" if the plaintiff was to retire from the business. This was agreed to by the defendant, as evidenced by its answer of February 20, 1907, which in effect accepted this offer of plaintiff's, and to which plaintiff replied affirming the agreement and stating that he would move at once. The context of these communications clearly shows that the negotiations resulted in an agreement by the defendant to purchase plaintiff's property, to employ him in its business, and to take the corporate stock off his hands if he should be discharged from its service. Subsequent events fully corroborate these facts. It appears that the plaintiff, pursuant to these arrangements, forthwith transported the property embraced in this transfer to Eau Claire, that defendant accepted it, and that plaintiff entered into and remained in the defendant's employ until his discharge about April 1, 1908, the year following. The court's conclusion that the evidence showed without dispute that the defendant agreed to purchase the personal property specified, pay therefor by transferring to plaintiff $5,000 worth of its corporate stock, and in case plaintiff was discharged from its service to take such stock off his hands, is fully sustained by the record and cannot be disturbed.

It appears that the plaintiff, after his discharge from defendant's service in April, 1908, offered by letter to return

this stock to the defendant and demanded payment of $5,000 in cash therefor. Defendant refused to comply with this request. Plaintiff thereafter and before action was brought tendered to defendant the certificates of stock properly indorsed. Again it refused to accept them, and denied that the defendant company was obligated to receive them. Thereupon this action was commenced to recover the sum of $5,000 under such agreement. At the trial plaintiff again tendered the certificates of stock and defendant persisted in its refusal to accept them. There is no dispute as to plaintiff's discharge from the defendant's employ as alleged by him. The question is: To what relief is plaintiff entitled under these facts? The terms of the stipulation are in substance that in case of plaintiff's discharge from defendant's employ it would take his stock at par. The effect of this is that the defendant obligated itself to take at par the $5,000 worth of its stock held by the plaintiff whenever the contingency of his discharge from its employ happened. Plaintiff has tendered full performance of his obligation and stands ready to comply with its terms by transferring the stock to the defendant. Under these circumstances the plaintiff's acts are in a legal sense the equivalent of a delivery of the certificates of stock and entitle him to a recovery of the agreed price, namely, $5,000. After plaintiff, by entering defendant's employ and continuing therein until discharged, had performed his part of the agreement and had tendered a transfer of the stock certificates in compliance therewith, defendant's refusal to pay for the stock operates as a breach of this part of the agreement. Upon these facts and the circumstances of the transaction plaintiff is entitled to stand upon the agreement as being performed by him and the defendant is obligated to accept the certificates of stock as tendered and pay the plaintiff the amount due for the stock, namely, the sum of $5,000. *Thorndike v. Locke,* 98 Mass. 340; *Pearson v. Mason,* 120

Mass. 53; *Pratt v. S. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368.

We are satisfied from the record that the court properly dismissed the defendant's counterclaim for want of evidence to support it.

The judgment is correct as to amount and proper in form and must stand.

By the Court.—Judgment affirmed.

VINJE, J., took no part.

STANLEY SCANDINAVIAN EVANGELICAL LUTHERAN CONGREGATION, Appellant, vs. LA CROSSE STEEL ROOFING & CORRUGATING COMPANY, Respondent.

January 13—January 30, 1912.

Contracts: Guaranty: Breach: Evidence: Changing finding in special verdict: Appeal: Reversal: Direction as to proceedings below: Alternative motions.

1. In an action for breach of a contract guaranteeing the slate roofing on plaintiff's building against leakage caused by defective workmanship, it is *held* that there was evidence from which the jury might find, as they did, that leakage in the roof was caused by defective workmanship; and it was error, therefore, for the court to change that finding.
2. Defendant moved the trial court to change a finding in the special verdict, and that if such motion should be denied a new trial be granted, and if the latter should also be denied that the damages be reduced. The court granted the first motion and gave judgment for defendant on the verdict as changed. Upon reversal of such judgment the cause is remanded with directions to consider and determine the other motions before awarding judgment.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Reversed.*

This is an appeal from a judgment in defendant's favor. The action is for damages for breach of a contract guaranteeing a slate roofing on the church building of the plaintiff. The case is stated in the opinion.

For the appellant there was a brief by *C. B. Culbertson* and *Bunge & Bosshard,* and oral argument by *Geo. W. Bunge.*

Jesse E. Higbee, for the respondent.

SIEBECKER, J. In the fall of 1906 the plaintiff built a church at Stanley, Wisconsin, the defendant having the subcontracts for the construction of the slate roofing and of the gutters and cornices. Before final payment was made, the defendant gave the following guaranty to the building committee of the church:

"GENTLEMEN: We hereby guarantee the slate roofing which we put on your church against any leaking caused by defective workmanship on our part for a period of five (5) years."

This is an action for damages under this guaranty.

The tower of the church, the roof over that part of the church called the sanctuary, and the roof over the main body of the church were covered with slate. The rafters in the roof over the main body of the church are placed horizontally, parallel with the ridge of the roof, and are supported by three trusses. The sheathing on this roof of the church is of birch and is nailed onto these rafters at right angles to them and runs from the ridge of the roof to the side walls. This birch was not of uniform width and was not matched. The sheathing on the tower and over the sanctuary is of hemlock and pine and the rafters in these roofs are so arranged that the sheathing is horizontal, unlike the sheathing on the main roof.

The roofer's specifications provided that the first row of slate above the gutters should be laid in slater's cement. The evidence shows that this is to prevent water which might accumulate in the gutters, because of ice, snow, or other ob-

structions, from backing up under the slate and leaking into the building. Wherever there was a projection above the roof, such as chimneys and the tower, the specifications provided that flashing and counter-flashing should be placed by the roofers. The sheet of metal which is placed partly under the slate and bent up along the side of the projecting wall is called flashing. A similar sheet of metal fastened into the projecting wall or chimney above the flashing is bent down over the flashing and is called the counter-flashing.

That water leaks through the roof into the church is not disputed. There was evidence tending to show that there were a number of places on the ceiling of the church and of the sanctuary which showed stains from water leaking through the roof. There was evidence tending to show that the worst leak in the building came from water backing up in one of the gutters, and that the next worst leak was caused by the falling out of some of the counter-flashing.

The evidence showed that the defendant made repairs on the roof in 1908. There was evidence in plaintiff's behalf tending to show that the slate was nailed upon the roof by inexperienced boys and in an unskilful and unworkmanlike manner; that the slate had not been sorted according to thickness, and that the failure to so sort would leave an open space under part of a slate placed over a crack where slates of uneven thickness were placed together, into which snow and rain might be blown, and that the snow and rain on freezing might break the sheet of slate above it; that no slater's cement was placed under the layer of slate next to the gutter as provided by the specifications; that felt had not been placed under the slate as provided by the specifications, or that it had been torn because of poor workmanship; that the counter-flashing had been fastened with nails and had not been wedged in and fastened to the projections above the roof by lead, as good workmanship required; that the counter-flashing did not cover the flashing properly; that slate which was

not sorted was liable to be broken by sliding ice and snow at the places where it did not fit closely and smoothly upon the under layer; that a large number of sheets of the slate were broken; and that the sheets of slate had fallen in numbers from the tower, the main roof, and the roof over the sanctuary.

The court held that any damages caused by reason of defective gutters or cornices were not covered by the guaranty. There was evidence in defendant's behalf to the effect that the proper construction for the under roof for slate was such that the rafters would run from the ridge of the roof to the walls; that the main roof of the church had settled because of the improper construction, and that this was the cause of the widening of the cracks between sheets of slate in some places and of their being shoved together in others and of the breaking and falling of slates; that birch as sheathing under slate was liable to warp, and by pressing up against the sheets of slate cause them to break; that the trusses supporting the main roof were weak and insufficient; that by reason of the sheathing running with the pitch of the roof, many of the sheets of slate were of necessity nailed upon two boards, and that a shrinking and warping took place under these conditions which would cause cracking and breaking of the slate; and that the counter-flashing had become loose and fallen out because poor mortar had been used in the mason work.

The evidence of the plaintiff's witnesses upon the subject of the construction of the main roof of the church was to the effect that the construction provided in this case was not the best, but was probably all right.

The jury returned the following verdict:

"(1) Is the leaking through the slate roof of the plaintiff's church caused by defective workmanship on the part of the defendant? *A.* Yes.

"(2) If you answer question No. 1 'Yes,' then is it necessary in order to repair such defects to remove the entire slating and relay it? *A.* No.

"(3) If you answer question No. 2 'Yes,' then what would be the reasonable cost of removing the present slating and relaying it, using all the old slating as is suitable for such purpose? *A.* ——.

"(4) If you answer question No. 1 'Yes' and question No. 2 'No,' then what would be the reasonable cost of repairing the defects occasioning such leaking? *A.* $495."

The court upon defendant's motion ordered the answer to the first question changed from "Yes" to "No," and gave judgment for the defendant upon the verdict as so changed.

The appellant contends that the court erred in setting aside the finding of the jury in answer to the first question of the special verdict, whereby it was found that the leaking of the slate roof was caused by the defective workmanship of the defendant in constructing it. From the foregoing statement of the case it appears that the evidence is undisputed that the roof has leaked in many places from the time it was built, that the slate was not sorted as required to make an even and smooth surface, and that slates broke at various times from its completion to the time this action was commenced. There seems to be no dispute that some of the flashing was in an imperfect condition. It however is not clear that this caused water to leak into the building. The witness Staples, who was called as an expert, testified that the sorting of the slate was so imperfect as to leave the roof in so uneven a condition as to permit water and ice to collect between the sheets of slate and cause them to be displaced. He also gave it as his opinion that the breaking of slate as observed by him could be caused by imperfectly nailing the slate too tight. It also appeared that two inexperienced workmen assisted in laying the slate and that such work required skill and knowledge for a proper execution of this work. In the light of this evidence it cannot be said as matter of law that there was no evidence permitting of the inference, as the jury found, that the leakage in the roof was caused by defective workmanship. We must therefore hold that the court erred in changing the

answer of the jury to the first question of the verdict from "Yes" to "No."

The record shows that the defendant also moved the court, in addition to the motion asking the court to change the answer to the first question, that if this motion should be denied a new trial be granted, and, in the event of the denial of the motion for a new trial, that the damages be reduced. The court having granted the defendant's first motion, changed the verdict, and thereon awarded defendant judgment on the verdict as changed, it of course follows that the court did not pass on the motion for a new trial nor on the one for a reduction of the amount of the damages found. Since the action of the court pursuant to the defendant's first motion must now be reversed and this motion stand denied, it is proper that the cause be remanded to the trial court with directions that it consider and determine defendant's other motions before judgment is awarded.

By the Court.—Judgment reversed, and the cause remanded for further proceedings as indicated in the opinion.

ROY, Respondent, vs. CITY OF LA CROSSE, Appellant.

January 13—January 30, 1912.

Damages: Personal injury: Award not excessive.

An award of $1,150 is *held* not excessive for fracture of a wrist caused by a fall on a defective sidewalk, it appearing that the injury was a serious one, involving long treatment and a great deal of pain, and that at the time of the trial, nineteen months after the injury, the wrist was still in bad condition.

APPEAL from a judgment of the circuit court for La Crosse county: JAMES WICKHAM, Judge. *Affirmed.*

For the appellant there was a brief signed by *John F. Do-*

herty, attorney, and *A. H. Schubert,* city attorney, and oral argument by *Mr. Doherty.*

Jesse E. Higbee, for the respondent.

KERWIN, J. This action was brought to recover for personal injuries caused by a fall upon one of the sidewalks of the defendant city. The charge of negligence is that the sidewalk was defective in consequence of a fan-shaped ridge of ice formed thereon by water running from a spout upon an adjoining building; that the formation of ice was several inches in thickness, rough and uneven, and higher on the inside and middle of the walk than on the outside and sloping downward toward the outside; that the ice extended diagonally across the sidewalk and was covered by a light flurry of snow. There is evidence that the outer edge of the sidewalk was lower than the inner edge. The complaint charges the defective condition of the walk and the injury received by plaintiff on the 15th day of February, 1909, and that such defective condition continued for more than three weeks immediately preceding the injury, which defective condition rendered the sidewalk dangerous and unsafe for public travel.

The action was brought against the city and the adjacent property owner, but on the trial a nonsuit was granted as to the property owner. The case was tried before a jury and a verdict for $1,150 returned. Judgment was entered in favor of the plaintiff upon the verdict, from which this appeal was taken.

The errors relied upon raise the questions of the sufficiency of the evidence to support the verdict on the questions of defect, notice to the defendant of such defect, and whether the damages are excessive. On the questions of defect and notice to the city we regard the evidence ample to support the verdict, and shall spend no time in discussing it. The plaintiff received a fracture of the wrist. The case was tried one year and seven months after the injury and the wrist was

then in bad condition. Plaintiff had not been able to use her arm up to that time as she did before. The evidence shows the injury to have been serious. Splints were on the wrist for two months, and then it was put in a plaster cast for about six weeks, the doctor attending constantly. After the cast was taken off leather splints were put on. It also appears that the plaintiff suffered a great deal of pain. After an examination of the evidence we cannot say that the damages are excessive.

By the Court.—The judgment of the court below is affirmed.

STATE EX REL. RONGLIEN, Appellant, vs. CLEMENSON and another, Town Clerks, Respondents.

January 13—January 30, 1912.

Highways: Laying out: Determination of supervisors: New application, when barred: Order: Sufficiency of description.

1. Proceedings of town supervisors upon an application for the laying out of a highway, which did not include any "determination" thereon, are not a bar to their acting upon a new application for such highway within one year.
2. In an order laying out a highway the description thereof is sufficient if, although the number of the section is omitted in describing the starting point, any surveyor could accurately locate the road by beginning at the designated ending and working backward, and only the section intended will answer the calls of the description.

APPEAL from a judgment of the circuit court for Trempealeau county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *R. S. Cowie* and *G. O. Linderman,* and for the respondents on that of *S. G. Gilman.*

TIMLIN, J. *Martin M. Ronglien,* a landowner through whose land a highway was laid out upon the town line by the supervisors of the towns of Unity and Albion, sued out a writ of *certiorari* directed to the clerk of each town (ch. 146, Laws of 1901) to review the proceedings laying out this highway, assigning as error that the order was made within one year from the date of acting upon a different petition for laying out the highway, and also that in the final order the description of the highway is indefinite and uncertain. They answered by return to the writ that in June, 1909, there was received and filed by each of said clerks notice of a joint meeting of the supervisors of the several towns to be held on July 3, 1909, at a designated place to decide upon the application. Each notice recited that an application had been made in May, 1909, by thirty-one freeholders, etc., but no application was returned, while it is certified that all papers filed in the clerk's office are returned. These notices are not identical. That filed with the clerk of Unity says the application described the proposed highway as commencing on the town line between Unity and Albion six rods north of the southeast corner of the northeast quarter of section 25, town 24 north, of range 9, thence north on the town line about a half a mile to intersect the highway on the north line of section 25. That filed with the clerk of Albion describes the highway as commencing six rods north of the northeast corner of the northeast quarter of the same section, town, and range. There are affidavits of service and posting on June 18th and an order of the supervisors adjourning until July 24, 1909, and here these proceedings end. There was therefore no "determination of the supervisors" shown. Sec. 1283, Stats. (1898); *Schillock v. Jones,* 147 Wis. 119, 132 N. W. 908.

The relator must make error appear. We cannot presume it. So there does not appear to have been any bar to the new application made on September 24, 1909. Here again there seems to have been some difference in the petitions filed in

each clerk's office, but this is not assigned as error in the petition for the writ and need not be considered. *State ex rel. Haeselich v. Schweitzer,* 131 Wis. 138, 111 N. W. 219. The alleged defective description in the order laying out the highway is as follows:

"Beginning at a point ½ rod west of the Town line between the Towns of Albion and Unity, six rods north of the South East corner of the North East quarter, Town 24, Range 9, West, thence north ½ rod West of the Town line about ½ mile to intersect the public highway on the north line of said sec. 25. . . . The line of said survey is the center of said highway, and the same is laid out of the width of three rods."

Damages were awarded to the owners of the "East ½ of the N. E. quarter, sec. 25, town 24 north, of range 9 west," and the "West half of the north west quarter, sec. 30, town 24 north, of range 8 west." Apparently the section number is omitted in describing the starting point. But any surveyor could accurately locate this road by beginning at the designated ending and working back. The certain data are: (1) that it is parallel with and one half rod west of the town line; (2) that at its north extremity it intersects the highway on the north line of section 25; (3) that its length is about half a mile; (4) that its south end is one half rod west and six rods north of the southeast corner of the northeast quarter of some section not given. Only section 25 will answer these calls. *State ex rel. Gottschalk v. Miller,* 136 Wis. 344, 117 N. W. 809.

The judgment must be affirmed.

By the Court.—Judgment affirmed.

SCHMIDT, Appellant, vs. RAYMOND, Administrator, Respondent.

January 13—January 30, 1912.

Estates by the curtesy: Rights of wife's creditors.

1. **In this state the right of creditors of a deceased wife to have her estate subjected to the payment of her debts takes precedence over the husband's estate by the curtesy.**
2. **Curtesy initiate has been abrogated in this state.**

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Louisa Schmidt died intestate on November 30, 1908, and left surviving her the plaintiff, who was her husband, and one son, the issue of the marriage between plaintiff and deceased. At the time of her death she was the owner of 160 acres of land which had been mortgaged to one Phillips to secure a loan of $450. The plaintiff joined in the execution of this mortgage. The mortgaged premises were sold on foreclosure proceedings in March, 1910, for $950, which sum exceeded the amount due on the mortgage and the costs of foreclosure in the sum of $355.55, which amount was paid to the administrator of the estate of said Louisa Schmidt. Unsecured claims were allowed against the estate of the deceased in the county court to the amount of $217.62. The plaintiff petitioned said court to have his interest as a tenant by the curtesy admeasured and set apart to him out of the proceeds of the foreclosure sale in the hands of the administrator, prior to the depletion of the fund by the payment of the expenses of administration or the debts of the deceased other than that secured by the aforesaid mortgage. The prayer of the petition was granted, and on appeal the circuit court reversed the decision of the county court and remanded the cause to the county court with directions that the debts allowed against the estate of the decedent and the costs of administra-

tion be paid out of the surplus moneys in the hands of the administrator derived from the foreclosure sale before the admeasurement of curtesy in favor of the plaintiff, and that plaintiff have curtesy in the balance of said fund remaining after such debts and expenses were paid. From this judgment plaintiff appeals.

For the appellant the cause was submitted on the briefs of *John A. Daniels.* He contended, *inter alia,* that where a wife incumbers her real estate by a mortgage in which her husband joins, and the land is sold under the mortgage, he having a right of curtesy in the land, the mortgage will be paid out of the purchase money and the husband will have curtesy in the balance. *Robinson v. Lakenan,* 28 Mo. App. 135; *In re Freeman,* 116 N. C. 199, 21 S. E. 110; 12 Cyc. 1014, note; *Kemph v. Belknap,* 15 Ind. App. 77, 43 N. E. 891; *Hampton v. Cook,* 64 Ark. 353, 62 Am. St. Rep. 194; *In re Camp,* 126 N. Y. 377, 27 N. E. 799. In our state the married women's act controls curtesy initiate and suspends its operation, but it attaches to her real estate as at common law and becomes consummate immediately on the death of the wife in all the lands of which she dies seized not disposed of by will. Sec. 2180, Stats. (1898). It partakes of the same nature as the curtesy given the husband at common law. 12 Cyc. 1003; *Shortall v. Hinckley,* 31 Ill. 219; *Williams v. Lanier,* 44 N. C. 30; *Canby's Lessee v. Porter,* 12 Ohio, 79; *Lancaster Co. Bank v. Stauffer,* 10 Pa. St. 398; *Kingsley v. Smith,* 14 Wis. 360; *In re Starbuck's Estate,* 63 Misc. 156, 116 N. Y. Supp. 1030; *Neelly v. Lancaster,* 47 Ark. 175, 1 S. W. 66.

For the respondent the cause was submitted on the brief of *Morris & Hartwell.*

BARNES, J. The appellant was entitled to curtesy in the real estate owned by his deceased wife at the time of her death. Sec. 2180, Stats. (1898). The only question in-

volved is whether the right of her creditors to have her estate subjected to the payment of her debts is paramount to the right of appellant. The question must be answered in the affirmative. Sec. 3874, Stats. (1898), provides that, where the personal estate of a deceased person is insufficient to pay debts and expenses of administration, the personal representative may mortgage, lease, or sell his real estate, excepting the homestead, to pay such debts and expenses, on obtaining a license so to do in the manner provided. No exception is made in favor of the husband who is entitled to an estate by the curtesy. It is argued, however, that the same rules of law are applicable to dower and curtesy, and that the dower interest of the wife cannot be reached by creditors of the husband. There was a close analogy between dower and curtesy at common law, but this analogy has been destroyed by statute. Curtesy initiate has been abrogated in this state. Secs. 2342 and 2180, Stats. (1898). By the first section the wife during coverture has the absolute right to convey her real estate without the husband joining in the conveyance, and he is not entitled to an estate by the curtesy in lands so conveyed. By the second section the husband is given an estate as tenant by the curtesy, or curtesy consummate, only in such lands as the wife died seized of and as were not disposed of by will. The wife has an inchoate right to dower in lands owned by her husband, of which she cannot be deprived by any act of her husband without her consent evidenced by a deed of conveyance or in some other appropriate manner. Sec. 2159, Stats. (1898). It is beyond his power to defeat that interest by will. By operation of law, as soon as marriage occurs, the wife acquires an inchoate interest in the real estate of her husband owned by him at the time of marriage, and also in lands thereafter acquired by him. The husband acquires no interest in the lands of his wife prior to her death. She may convey or devise her lands and entirely defeat his right to curtesy. So it is apparent that dower and curtesy

do not stand on the same footing, in so far as the rights of creditors are involved. It is quite significant that, while sec. 3885, Stats. (1898), provides for the admeasurement of dower, in the event of it being necessary to sell the lands of a deceased husband to pay debts, no such provision is found in regard to curtesy. If the legislature had considered that the right of the husband by curtesy took precedence over the claims of creditors, no doubt a provision would have been made for the admeasurement of curtesy as well as of dower. The conclusion reached in this case is supported by the following cases decided elsewhere: *Bennett v. Camp,* 54 Vt. 36; *Arrowsmith v. Arrowsmith,* 8 Hun, 606; *Johnson v. Minnesota L. & T. Co.* 75 Minn. 4, 77 N. W. 421. The cases cited by the appellant, with possibly one exception, deal with the right of curtesy as it existed at common law, where the husband had an inchoate right in the estate of the wife during coverture.

By the Court.—Judgment affirmed.

STATE EX REL. MONROE COUNTY, Appellant, vs. VERNON COUNTY and others, Respondents.

January 13—January 30, 1912.

Hospitals for the insane: County chargeable with patient's support: Correction of mistake: Board of control: Second application for correction: Statute construed.

Where, upon the application of a county to which the support of an inmate of a state hospital or county asylum has been charged, the state board of control has made an order, pursuant to sec. 591, Stats. (1898), that such support is chargeable to another county, the latter county may, even though it has not appealed from such order and the time limited for taking an appeal has expired, apply for relief from the burden imposed by such order, and upon such an application it may be claimed,

and the board of control has power to determine, that the county first named was in fact properly chargeable with such support. Nothing in the language of said sec. 591, giving the county named in the first order the right to apply for relief therefrom, limits its right to litigate the question of liability so as to exclude the county with which that question was previously litigated. VINJE, J., WINSLOW, C. J., and MARSHALL, J., dissent.

APPEAL from a judgment of the circuit court for Monroe county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *Naylor & McCaul,* of counsel, and *T. P. Abel,* district attorney, and for the respondents on that of *J. Henry Bennett,* district attorney.

BARNES, J. On January 2, 1906, one Olaus Sletten, then residing in *Monroe County,* was committed to the state hospital for the insane at Mendota. In May, 1906, the *County of Monroe,* acting under sec. 591, Stats. (1898), submitted proofs to the state board of control showing or tending to show that Sletten had not been a resident of *Monroe County* for a period of one year before his commitment, but was in fact a resident of *Vernon County.* An order to show cause why the *County of Monroe* should not be relieved from the expense of keeping said Sletten at the Mendota hospital, and why *Vernon County* should not be charged with such expense, was procured from the state board of control. *Vernon County* did not appear on the hearing of such order, and on July 5, 1906, said board determined that *Monroe County* should be relieved of any charge on account of said Sletten and that *Vernon County* should pay such expense. No appeal was taken from this order. On June 16, 1908, *Vernon County* petitioned the aforesaid board for a rehearing in said matter, and thereafter notice was served by *Vernon County* on *Monroe County* that the former would move the state board, at a time and place stated, for an order relieving *Ver-*

non County and charging *Monroe County* with the cost of keeping said Sletten. This motion was heard on August 4, 1908. *Vernon County* appeared in support of the motion, and *Monroe County* appeared specially and objected to the jurisdiction of the board to hear the motion. This objection was overruled, and on January 6, 1909, the board of control made an order revoking its former order and determining that *Monroe County* should be charged with the cost of maintaining said Sletten. The relator in this proceeding sued out a writ of *certiorari* to review this last determination.

The circuit court awarded judgment quashing the writ, and the relator appeals from that judgment. The following reasons are urged for a reversal of the decision of the circuit court: (1) The order of July 5, 1906, not having been appealed from within one year, as provided by sec. 592, Stats. (1898), it became final and conclusive between the parties hereto. (2) Two years having elapsed and neither county having taken an appeal from the said order of July 5, 1906, the board was without jurisdiction to take any further action in said matter; and (3) there was no evidence produced before the board to show that Sletten had resided in *Monroe County* continuously for the period of one year before his commitment.

The first two contentions of the appellant involve the construction of secs. 591 and 592, Stats. (1898). In reference to the third contention, we think there was some evidence to support the conclusion of the state board of control to the effect that the residence of Sletten in *Monroe County* was sufficiently established to warrant the expense of his keep being charged to that county. We do not deem it useful to discuss this question at any greater length. The bulk of counsel's argument is devoted to the two other points raised. Were it not for the last sentence of sec. 591, Stats. (1898), we would have no hesitancy in saying that the position taken by the relator was unassailable. There is a provision for notice to

the parties in interest and for a trial before the board of control and for an appeal from its judgment at any time within one year by either party. The law usually aims to bring controversies to a speedy end, and the provision giving one year in which to take an appeal is liberal as to time and ought to enable the parties to protect their rights by resorting to this remedy. But it was competent for the legislature to provide that the order of the board of control should not be final even if an aggrieved party failed to avail itself of the right to appeal, and we think that it has done so by the last sentence of sec. 591, Stats. (1898), which reads as follows:

"From and after the making of such order such inmate's support shall be charged in accordance therewith; provided, that the county named in such order may, in like manner, apply to said board for relief from the burden thereby imposed, in which case the matter shall be heard and disposed of as herein provided."

This clause states in plain language that after the board of control has determined that a certain municipality is chargeable with the support of an insane person it may apply to the board for relief from such order. No limitation is made as to the time when such application may be made, nor as to the parties who may be brought before the board on such an application. Now we are asked to say that the application can be made only when it is sought to charge some political entity other than that which was a party to the first proceeding, and to make an exception in favor of the party that was successful on the original hearing, because by so doing we will be carrying out the legislative intent. Seeking after the intent of a body composed of 133 members is often a difficult and an elusive pursuit. Ordinarily the safest guide to follow in seeking light on the subject is to take and apply the language used in its common and ordinary sense. *Ashland v. Maciejewski,* 140 Wis. 642, 643, 123 N. W. 130, and cases cited. If the legislature intended to make an exception such

as it is argued should be read into the law, it is fair to assume that such an exception would have been incorporated in the quoted clause. It may be that, had the point raised been thought of by the legislature, such an exception would have been made; but if the omission was the result of a lack of foresight, it is not the function of a court to supply it, even though the language used may present an incongruous situation. It is not the function of the court to legislate. It seldom happens that, when a legislative body says one thing, a court is justified in saying that it meant something else. It is better that our law makers should correct their own errors, if errors they make, than that a court should endeavor to do so by construction. In the instant case it would be particularly inappropriate to hold that the law makers did not say just what they meant and all they meant. They may have intended to permit a municipality, at any time it discovered that it was wrongfully charged with the support of an insane person, to go before the board of control and present its evidence, regardless of any former finding on the subject and regardless of the length of time that had elapsed since such finding was made. As the statute was originally enacted (ch. 229, Laws of 1881) there could be no second application to the board of control to determine the legal residence of an insane person, except where the municipality charged in the first order was not the one named in the application therefor. It is significant that this provision was dropped out of the Revision of 1898; so that now the second application may be made although the party making it was named in the application for the first order as well as in the order itself. If the legislative purpose was not as above indicated, the statute can easily be amended and in the meantime no great amount of harm will result from its enforcement as written. We think we would be taking undue liberties with the language here used to read out of it the exception contended for, and that if

we attempted to do so we would be reading something into the statute that is not found there.

By the Court.—Judgment affirmed.

The following opinion was filed February 3, 1912:

VINJE, J. (*dissenting*). Sec. 591, Stats. (1898), prescribes how counties may test before the state board of control the question of their liability to support an insane person who is an inmate of a county or state hospital. The latter part thereof reads:

"From and after the making of such order such inmate's support shall be charged in accordance therewith; provided, that the county named in such order may, in like manner, apply to said board for relief from the burden thereby imposed, in which case the matter shall be heard and disposed of as herein provided."

Sec. 592, Stats. (1898), gives a party aggrieved by such order one year in which to appeal to the circuit court of the county to which the person named in such order is alleged to be chargeable.

In view of the policy of the law to end disputes about the same subject matter between the same parties, and of the fact that each county has one year in which to take an appeal—presumably ample time in which to ascertain the facts as to its liability,—it does not seem reasonable to so construe the statute as to permit the same parties to relitigate the same subject matter before the same tribunal *ad libitum*. Such a construction should not be put upon it if it will reasonably bear any other. It is not straining the language of the proviso to construe it to give the right to the county named in the order to litigate its liability with the state or any county *other than the one it has already litigated it with*. This interpretation gives full force and effect to every word

of the statute, and is in harmony with the procedure relating to disputes in all forums, namely, progress towards an end. Under the procedure of this statute, as construed, it is impossible even to approach, much less to reach, the end of the dispute. If a county is dissatisfied with the order made it has an adequate remedy by appeal, and ample time in which to take it. That it should be given the option of appeal from the order to the circuit court, or of a retrial, as many times as it may choose, before the tribunal that made the order, seems anomalous. The legislature could have intended no such result, and the language used does not necessarily lead thereto. We have long had statutes of rest. We now have one of unrest—one that sanctions perpetual strife.

WINSLOW, C. J., and MARSHALL, J. We concur in the foregoing opinion by Mr. Justice VINJE.

DOYLE, Respondent, vs. LA CROSSE CITY RAILWAY COMPANY, Appellant.

January 13—January 30, 1912.

Street railways: Injury to lineman: Charged span wire: Negligence: Questions for jury: Electricity: Degree of care required.

1. In an action for injuries sustained by a lineman in falling from a pole the evidence is *held* to sustain a finding by the jury that such fall was caused by an electric shock received from a span wire with which plaintiff accidentally came in contact.
2. But, it appearing that there was absolutely nothing to indicate any defect in the insulation of any charged wire at the place and time in question, that the appliances were of approved pattern and material, and that all appeared to be in perfect order, and there being no evidence that defendant had failed to exercise due care in inspecting the wires and insulators, it is *held* that there was no warrant for a finding by the jury that the

presence of a dangerous current of electricity in the span wire was due to negligence on the part of defendant.

3. Greater care is required of persons handling so dangerous an agency as electricity than is required of those who handle mere ordinary substances, but the criterion of ordinary care is the same: it is such care as the majority or great mass of mankind exercise under the same or similar circumstances.

APPEAL from a judgment of the circuit court for La Crosse county: E. C. HIGBEE, Circuit Judge. *Reversed.*

This is an action brought to recover for personal injuries sustained by the plaintiff while in the employ of the defendant, resulting from a fall from one of the defendant's poles, which pole the plaintiff was preparing for the use of the defendant for trolley purposes. The negligence claimed by the plaintiff is that the defendant allowed a span wire, with which the plaintiff accidentally came in contact, to become charged with electricity, by reason of which the plaintiff received a shock which precipitated him to the ground. The defendant denied that the span wire was charged with electricity, and claimed that the plaintiff fell to the ground accidentally or by reason of his own negligence.

The plaintiff at the time of the accident, September 16, 1909, was an experienced lineman who had been engaged in electrical work in the construction of trolley lines and in other capacities for about twelve years. He had been employed by the defendant about ten days prior to the time of the accident. The defendant owned and operated a double-track street railroad in the city of La Crosse, operated by an electric current of 550 volts, supplied by overhead trolley. The power house of the company was located immediately across the street from the pole where the accident happened. On the day of the accident the plaintiff was at work getting cross-arms ready for new poles, at about 8 o'clock in the morning, when the defendant's superintendent, Shaw, instructed him to put cross-arms on three or four poles on the east side of Third street, immediately opposite the power

house. The plaintiff started about this task with a helper named Peterson. They commenced work upon the pole where the accident happened, which was nearly opposite the power house. This was a pole which had been recently put in place, and there were no cross-arms upon it. The only wire attached to it was a guy wire, which extended easterly to the ground. It was attached to the pole about six inches below the point where the lower cross-arm was subsequently placed by plaintiff. To the east of this new pole was an older pole, which was still in use and supported the span wire in question, which extended across the street at this point and supported the trolley wires. This span wire was made of seven or eight strands of twisted galvanized iron, and passed the new pole about four inches away from and to the south of it, and about four inches below the point where the guy wire was attached to the new pole. From this span wire were suspended three insulated hangers, to which three trolley wires were attached. Two of these trolley wires seem to have been the wires over the tracks of the railway, and the other over the track which led into the house. The hangers or insulators by which the trolley wires were attached to the span wire were the Ohio Brass Company's hangers, and are supposed to be thoroughly insulated, so that the electric current cannot escape from the trolley wire to the span wire. The plaintiff was equipped with spurs and a safety belt, and mounted the pole to a point where he could conveniently handle the cross-arms, and put them in the gains which had been cut in the pole for the purpose. His assistant, Peterson, passed to him the cross-arms, and the plaintiff put them in position. While the plaintiff was putting the cross-arms in position Peterson stood very near him upon the top of the elevated wagon called the "Jim wagon," which was used by the defendant in the repairing and construction of its lines, and the platform of which was about sixteen feet from the ground. He had his arm over the span wire in question. After the plaintiff had

placed the cross-arms in position and bolted them, he proceeded to pull the metal braces, which were upon the cross-arm, down in order to screw them in position. Before this work was accomplished, one Sewojski, the defendant's assistant superintendent, came to the place, and got on to the Jim wagon and told the plaintiff to stop his work there and go to Onalaska and cut off some wires upon a certain pole there, and leave Peterson to finish up the job he was then engaged in. The plaintiff testifies that he then took off his safety belt, put his right hand upon the guy wire, and reached up his left hand to the south cross-arm in order to see whether it was plumb with the north cross-arm, and that while he was doing this his left hand came in contact with the span wire, which was just in front of his breast, and an electric current gripped him, and that is all that he remembers until he woke up in the hospital. The fact is undisputed that he fell from the pole. The helper, Peterson, denies that the plaintiff touched the span wire, and says that he fell as he was starting to get down, by reason of his spurs not taking hold of the pole. Plaintiff was very seriously injured.

The jury returned the following verdict:

"(1) Was the span wire in question charged with a dangerous current of electricity at the time that plaintiff was directed to work upon the pole from which he fell? *A.* Yes.

"(2) If you answer question No. 1 'Yes,' then was such condition of the span wire due to defective and insufficient insulation of one or more of the hangers supporting the trolley wire attached to such span wire? *A.* Yes.

"(3) If you answer question No. 2 'Yes,' then could the defendant in the exercise of ordinary care have discovered and repaired such condition before directing the plaintiff to go to work upon said pole? *A.* Yes.

"(4) If you answer question No. 2 'Yes,' then was such condition of the wire the proximate cause of plaintiff's injury? *A.* Yes.

"(5) Was the plaintiff wanting in the exercise of any ordinary care which contributed to his injury? *A.* No.

"(6) If the court shall finally determine that the plaintiff is entitled to recover, at what sum do you assess his damages? *A.* $12,000."

The court denied successive motions made by defendant for judgment notwithstanding the verdict, to change the answers to a number of the questions in the verdict and enter judgment thereon as so changed, and to set aside the verdict and for a new trial, and rendered judgment on the verdict for the plaintiff, from which judgment the defendant appeals.

For the appellant there was a brief by *Woodward & Lees* and *George H. Gordon,* and oral argument by *Mr. G. M. Woodward* and *Mr. Gordon.*

For the respondent there was a brief by *Morris & Hartwell,* and oral argument by *Thomas Morris* and *F. H. Hartwell.*

WINSLOW, C. J. The plaintiff's claim is that he took hold of the guy wire with his right hand in order to assist himself upward, and that as he raised his left hand to adjust the cross-arm the hand came in contact with the span wire immediately in front of him, and that he received a shock of 550 volts, which gripped him, contracted his muscles, and then released him and let him fall to the ground. It is urged that this story is incredible, but we have not been able to come to that conclusion. It is true it was flatly denied by the evidence of the plaintiff's helper, Peterson, and it is true that the jury would have been amply justified in concluding from the evidence that the plaintiff fell from the pole without any electric shock, but we are not convinced that the plaintiff's version is impossible.

Our difficulty has been to discover any justification for the finding that the defendant was guilty of negligence. Granting that there was in the span wire at the moment of the accident a 550-volt current of electricity which found its way to the ground through plaintiff's body when he touched the

span wire with his left hand while his right hand was grasping the guy wire, still the defendant is not liable unless the presence of the electricity in the span wire was the result of its want of ordinary care.

The negligence found was that there was defective insulation of one or more of the hangers which the defendant ought to have discovered and repaired before the accident.

It is true that greater care is properly demanded of persons who are handling so dangerous an agency as electricity than of those who handle mere ordinary substances, yet the criterion of ordinary care is the same: it is such care as the majority or great mass of mankind exercise under the same or similar circumstances. *Nagle v. Hake,* 123 Wis. 256, 101 N. W. 409.

In the present case there is no evidence tending to show negligence by the defendant, unless it be the evidence tending to show the presence of electricity in the span wire. Even if that condition existed, however, it does not necessarily follow that the defendant was guilty of want of ordinary care. If it appeared without dispute that the span wire had been put up on the previous day by competent workmen, using approved material and appliances, and that it was to all appearances in perfect condition, we suppose none would claim that there would be any sufficient ground for a finding of negligence. There are limits to human endeavor. Even if we exercise the greatest care in our power, accidents will sometimes unaccountably happen. The risk of such accidents all must assume. In the present case it seems, as far as the evidence shows, that there was nothing in the construction or appearance of the wire or the hangers that would even suggest that the insulation had become defective. The hangers were of an approved pattern in common use. They were composed of a copper "ear" with a groove on the top surface into which the trolley wire fitted and was fastened. From this a bolt two or three inches in length, constructed of some

very tough, hard, nonconducting substance, extended upward into the iron ear which is attached to the span wire, and over this bolt, screwed on to the top of the ear, is a metal cap which keeps the insulated bolt in place. So long as the nonconducting bolt is intact and the cap is screwed on, even though it be not fully screwed in place, there is no possibility of the trolley wire or the ear in which it rests coming in contact with the span wire or the metal part of the hanger.

It appears that two of the hangers on the span wire in question had been in place two or three years, and one had been in place from five to seven years. There is no evidence that any of them had ever been loose or out of order in any way. They appeared to be all right on the morning in question. The plaintiff himself testifies that when he reached the top of the pole he looked around and saw that things were all right; the insulators and the trolley wire looked all right; he noticed the feed-wire running across the street above the trolley wires to the top of the old pole, and the insulator was all right there. He was but a few feet from all these fixtures. It seems to be established beyond peradventure in the case, therefore, that there was absolutely nothing to indicate any defect in the insulation of any charged wire at that place on the morning in question, and that, on the contrary, every appliance had the appearance of being in perfect order. As said before, it does not appear that any of the appliances at this place had ever been out of order or that the span wire had ever been known to be charged before.

This being the case, there can be but one possible ground of negligence claimed, namely, that the defendant had failed to exercise due care in inspecting the wires and insulators. If there were proof that such hangers became frequently out of repair and allowed the current to escape to the span wire, it might perhaps be claimed that there was evidence enough to go to the jury on the question whether the defendant was negligent in not making more frequent inspections. But

there is no such evidence. On the contrary, the plaintiff himself says that from his experience as a lineman he did not know that such insulators frequently became leaky or defective, and that he never saw one become defective so that it would leak. He admitted that he had been a trolley lineman for years.

Another lineman of long experience with trolley wires, named Gibbons, called as a witness by the plaintiff, testified that he had known of the cap of a hanger becoming loose by reason of the trolley passing under it day by day; that he had known such things to happen at several places; that he couldn't say how long such hangers had been on before they became loose,—it might be six months or a year, or at the end of ten years; that he could specify no time within which he had known a hanger to become loose, and that the loosening of the cap would not necessarily destroy the insulation; that it might last for several years in that condition, giving perfect insulation.

This is practically all of the testimony on the subject of the length of time which ordinarily elapses before the loosening of a hanger takes place from use, and it will be readily seen that there is absolutely no testimony that hangers frequently become loose or defective so as to permit the escape of electricity. In fact the only reasonable inference to be drawn is that it is generally, if not always, a matter of years. Now the testimony is undisputed that the company made a thorough test of the whole line twice a year, in spring and fall, going over and tightening up all the hangers, and that the whole line was gone over in the spring of 1909 to see that the insulation was perfect and nothing loose.

In view of the lack of any evidence tending to show that more frequent inspection was customary with other companies, or was called for by the fact that the hangers easily or frequently became defective from use, and the further undisputed fact that there was absolutely nothing to indicate

any defect in any of the hangers in question at the time of the accident, we do not think that the jury was entitled to find any want of ordinary care on the part of the defendant in the present case.

This view of the case obviates the necessity of the examination of any further questions.

By the Court.—Judgment reversed, and action remanded for a new trial.

HAUGE, Respondent, vs. LA CROSSE & SOUTHEASTERN RAILWAY COMPANY, Appellant.

January 13—January 30, 1912.

Railroads: Condemnation of land: Ownership: Amount of compensation: Elements included: Appeal: Questions considered: Record: Bill of exceptions.

1. **The question of the ownership of land taken by a railway cannot be considered on appeal to this court where the evidence on that subject is not incorporated in the bill of exceptions.**
2. **Where land is taken for a railway the compensation to be made ordinarily consists of two elements: the value of the land actually taken and the damage to the remaining land; but if no compensation is claimed or awarded for the land actually taken the railway company cannot complain of the omission of that element.**
3. **It cannot be held in such a case that there was error in permitting the jury to consider improper elements of damages, where the evidence in respect thereto was brought out by the appellant company and the instructions to the jury are not incorporated in the record.**

APPEAL from a judgment of the circuit court for Vernon county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to determine what compensation is due plaintiff on account of an alleged taking of land for right-of-way pur-

poses. There was a preliminary contest over whether plaintiff was the owner of the land, which was decided in his favor, no part of the evidence in respect thereto being preserved in the bill of exceptions, an award being duly made by commissioners, an appeal therefrom by plaintiff taken, and a trial on such appeal on the single question of the amount defendant should pay on account of the act complained of. The cause was submitted to the jury on such question, resulting in a finding in plaintiff's favor of a sum in excess of the award appealed from. Judgment was rendered thereon of which complaint in due form is made.

For the appellant there was a brief by *Wm. S. Burroughs* and *Chas. W. Graves,* and oral argument by *Mr. Burroughs.*

For the respondent there was a brief by *W. F. & A. C. Wolfe,* and oral argument by *W. F. Wolfe.*

MARSHALL, J. The judgment must be affirmed without giving much attention to the points raised by appellant's counsel. We are precluded therefrom because of the state of the record. The question of whether the land in dispute was the property of respondent, manifestly, cannot be considered because the evidence bearing thereon was not incorporated into the bill of exceptions.

The point that the court failed to submit to the jury and the jury failed to find as part of respondent's damages, the value of the strip of land taken, seems to be without merit. True, compensation, ordinarily, in cases of this kind is to be made up of two elements, the value of the land actually taken and damage to the remaining land. But where no compensation is claimed, other than for the latter element, no evidence is produced in respect to any other, and no judgment is rendered except as to the one, no reason is perceived why the appropriator should complain. There does not seem to be even irregularity to justify such complaint.

A point is made that the court permitted elements of dam-

ages to be considered by the jury which were improper. Whether such elements are recoverable need not be discussed, since, as respondent's counsel suggest, all evidence in respect to the matter was brought out by counsel for appellant, and instructions given by the court are not incorporated in the record so as to enable us to see whether such elements were submitted to the jury or not.

The question is raised as to whether the verdict is excessive, but the record so clearly shows that it was based on credible evidence, that it is not thought best to do more than make this brief reference to the matter.

One or two other points are suggested for consideration, but, in our judgment, there is not anything which would justify, much less require, further discussion of the case.

By the Court.—The judgment is affirmed.

SPELLUM, Respondent, vs. LA CROSSE & SOUTHEASTERN RAILWAY COMPANY, Appellant.

January 13—January 30, 1912.

APPEAL from a judgment of the circuit court for Vernon county: E. C. HIGBEE, Circuit Judge. *Affirmed.*

Action to recover compensation on account of taking lands for railway right-of-way purposes. The cause was submitted to the jury on the evidence, resulting in a verdict in plaintiff's favor upon which judgment was rendered.

For the appellant there was a brief by *Wm. S. Burroughs* and *Chas. W. Graves*, and oral argument by *Mr. Burroughs.*

For the respondent there was a brief by *W. F. & A. C. Wolfe*, and oral argument by *W. F. Wolfe.*

MARSHALL, J. The same points are raised in this case as in *Hauge v. La Crosse & Southeastern R. Co.*, *ante*, p. 288. The circumstances in the two cases being alike, the judgment must be affirmed for the reasoning stated for affirming that in the other case.

By the Court.—Judgment affirmed.

FAHRINGER, Plaintiff in error, vs. THE STATE, Defendant in error.

January 13—January 30, 1912.

Constitutional law: Usury: Criminal law.

Sec. 1691, Stats. (Laws of 1907, ch. 412), relating to usury, is a valid enactment.

ERROR to review a judgment of the municipal court of Milwaukee county: A. C. BACKUS, Judge. *Affirmed.*

For the plaintiff in error the cause was submitted on the brief of *E. M. McVicker.*

For the defendant in error there was a brief by the *Attorney General, Russell Jackson,* deputy attorney general, and *Winfred C. Zabel,* district attorney, and oral argument by *Mr. Jackson.*

KERWIN, J. This is a writ of error to review a judgment of conviction for loaning money at a rate of interest above the legal rate. The plaintiff in error was convicted of the alleged crime of loaning money at usurious rates of interest and sentenced to pay a fine of $25 and costs of suit and in default be imprisoned.

The contention of the plaintiff in error is that sec. 1691, Stats. (Laws of 1907, ch. 412), creating the offense of which plaintiff in error was convicted, is unconstitutional and void. The validity of this law is, as we understand the case, the only question involved upon this appeal. This question was settled by this court against the contention of plaintiff in error in *State ex rel. Ornstine v. Cary,* 126 Wis. 135, 105 N. W. 792, and the doctrine underlying that decision reiterated in later cases in this court. Therefore discussion of the question seems unnecessary.

By the Court.—The judgment is affirmed.

IN RE MURPHY.

January 30—February 2, 1912.

Habeas corpus: *Bail: Court commissioners: Jurisdiction: Circuit court: Supervisory control: Appropriate writs: Harmless error.*

1. There is no statutory warrant for the admission to bail, in *habeas corpus* proceedings, of one rightfully in custody upon a commitment issued by a court of competent jurisdiction after conviction of a criminal offense.
2. Where the circuit court has by order set aside proceedings of a court commissioner acting without jurisdiction (in this case admitting to bail a convicted man serving his sentence) and it appears that due notice of the motion and due opportunity for defense were given and that no substantial rights have been lost, this court will not necessarily disturb such order of the circuit court merely because it did not issue the proper formal writ—especially where the right result was unquestionably reached. *Potter v. Frohbach*, 133 Wis. 1, limited.

WRIT of *habeas corpus* issued out of this court.

William Kaumheimer and *J. W. Wagener,* for the petitioner.

Winfred C. Zabel, district attorney, *J. Elmer Lehr,* assistant district attorney, the *Attorney General,* and *Russell Jackson,* deputy attorney general, for the sheriff.

On February 2, 1912, the alternative writ of *habeas corpus* was quashed and the proceedings dismissed without costs. The following opinion was filed February 20, 1912:

WINSLOW, C. J. *Lawrence Murphy,* having been convicted of the offense of usury before the municipal court of Milwaukee county and sentenced to the house of correction for a term of ninety days, sued out a writ of *habeas corpus* before a court commissioner, and upon the return day of the writ the commissioner of his own motion adjourned the pro-

ceedings for eleven days, and made an order admitting the petitioner to bail pending the hearing. The petitioner gave bail, but, on motion made by the inspector of the house of correction, the circuit court for Milwaukee county made an order purporting to set aside all proceedings before the commissioner, and thereupon the inspector of the house of correction again took the petitioner into his custody under the original commitment. Thereupon the petitioner made his application to one of the justices of this court for a second writ of *habeas corpus,* and the same was issued out of this court. The foregoing facts appearing upon the return to the writ, the same must be quashed and the proceedings dismissed.

A number of questions were raised and discussed by counsel upon the hearing, but we deem it necessary to decide but one.

It was established beyond peradventure that the petitioner was in custody under the sentence of a court of competent jurisdiction after trial and conviction when the first writ of *habeas corpus* was issued by the commissioner.

Under these circumstances the commissioner had no jurisdiction to admit him to bail. Our statutes do not provide for admission to bail in any such case. If the proceedings be delayed the commissioner may commit the petitioner to the custody of the sheriff or other proper person pending the hearing (sec. 3431, Stats. 1898), but he has not authority to admit to bail a convicted man serving his sentence. The law contemplates no such general jail delivery as would be possible under such a condition of affairs.

It is therefore held that, irrespective of any other questions which might be discussed and decided on the record, it appears without dispute that the petitioner is rightfully in the custody of the inspector of the house of correction, upon a commitment issued by a court of competent jurisdiction after conviction of a criminal offense, and hence the writ must be

quashed. The act under which the petitioner was convicted was sec. 1691, Stats. (1898), as amended by ch. 278, Laws of 1905, and ch. 412, Laws of 1907. This act was sustained as constitutional by this court prior to the amendment of 1907 in *State ex rel. Ornstine v. Cary,* 126 Wis. 135, 105 N. W. 792, and after that amendment in *Fahringer v. State, ante,* p. 291, 134 N. W. 406, the latter case being decided after the hearing before the court commissioner. The claim of the petitioner in his proceedings before the court commissioner was that the act was unconstitutional. It is very evident that in view of the decisions just cited the petitioner had no ground on which to stand. It would seem that he ought to have been remanded at once by the commissioner on the strength of the *Ornstine Case,* inasmuch as the amendment of 1907 did not affect the questions in the present case.

It is urgently claimed that the circuit court had no jurisdiction to interfere with the action of the court commissioner upon a mere motion, but could only do so by one of the common-law writs by which the power of superintending control is exercised in the orderly course of business, and the case of *Potter v. Frohbach,* 133 Wis. 1, 112 N. W. 1087, is relied on to support the position. It must be admitted that there is language in the opinion in that case fairly tending to support that view, but the case was decided upon another ground, and the remarks upon the subject in question were intended to be in the nature of general propositions relating to the orderly methods of procedure in such cases, rather than unyielding rules of law. We say this much here in order to dispel the impression that this court has decided that it will under all circumstances condemn a proceeding by motion in a matter of this kind because the proper formal writ has not been issued. This court is endeavoring to look to substance rather than to mere forms of procedure, and, where it appears that due notice of the motion and due opportunity for defense have been

given, and no substantial rights have been lost, it will probably hesitate long before it will reverse the action of the trial court in such a case,—especially where the right result has been unquestionably reached.

By the Court.—The writ is quashed and the proceedings dismissed.

WANTA, Administrator, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY and the CITY OF MILWAUKEE, Respondents.

December 6, 1911—February 20, 1912.

Municipal corporations: Defective streets: Injury to traveler: Contributory negligence: Questions for jury: Evidence: Weight: Estimates and actual measurements.

1. A hole one and three-quarters inches deep is, as a matter of law, not an actionable defect in a street; but where a hole therein was six inches deep and about eighteen inches wide and twenty-four inches long, a jury might find that the street was not reasonably safe and that the city was negligent in not repairing it.
2. Testimony as to dimensions or distances which is based on memory or casual observation and is at best only an estimate must yield to that which is based on actual measurements; but the testimony of a witness who made actual measurements and remembers what they were is not to be treated as a mere estimate or to be disregarded merely because he is unable to produce the memorandum, made at the time, showing such measurements.
3. Where holes in the street were numerous, but travel thereon was not so obviously dangerous that a person ought to be held negligent in attempting to drive over it at all, it may be a question for the jury whether he was negligent in failing to see and avoid a particular hole which caused him to be thrown from his wagon and injured.

APPEAL from a judgment of the circuit court for Milwaukee county: ORREN T. WILLIAMS, Circuit Judge. *Reversed.*

On February 22, 1909, Frank Glass, the decedent, while driving a team of horses, hitched to an empty coal wagon, east on Oneida street in the city of *Milwaukee,* fell from the wagon to the pavement, sustaining injuries which caused his death. This action is brought to recover damages for the death of said Glass, the complaint alleging that the defendants permitted large holes to exist in the pavement at and near the point of the accident, both in the portion of the street maintained by said city and the portion between the tracks and one foot outside of each rail, maintained by the defendant railway company; that one of the wheels of the wagon on which decedent was riding dropped into a hole in the pavement, suddenly jerking and rocking the wagon in such a manner that decedent was thrown therefrom. The defendants answered separately. The city denied that any want of repair or insufficiency existed in said pavement, but alleged that, if any such defects did exist, the defendant railway company was responsible and not the city. The answer of the railway company was a general denial of the allegations of the complaint. On a directed verdict judgment was entered dismissing the complaint as to each of the defendants, and from such judgment plaintiff appeals.

For the appellant there was a brief signed by *Rubin & Lehr,* attorneys, and *W. B. Rubin* and *H. B. Walmsley,* of counsel, and oral argument by *Mr. W. B. Rubin* and *Mr. Walmsley.*

For the respondent *Milwaukee Electric Railway & Light Company* there was a brief by *Van Dyke, Rosecrantz, Shaw & Van Dyke;* for the respondent *City of Milwaukee* a brief by *Daniel W. Hoan,* city attorney, and *W. H. Timlin, Jr.,* special assistant city attorney, of counsel; and the cause was argued orally by *Mr. James D. Shaw* and *Mr. Timlin.*

The following opinion was filed January 9, 1912:

BARNES, J. The witnesses for the defense testified in substance that when the front wheels of the wagon which de-

ceased was driving struck the north rail of the north track the wheels skidded along the rail to the right for some distance, and that it was this movement that caused the decedent to fall. These witnesses negative the idea that the fall was caused by one or more of the wagon wheels dropping into a hole.

The witness Bork testified for the plaintiff that the wagon wheels dropped into one and probably two holes before the deceased was thrown out; that the left front wheel of the wagon came in contact with the south rail of the north track and the right front wheel in contact with the north rail of the south track, and that the wagon slid to the east until the left wheel dropped into a hole, and the sudden stop threw deceased out. The testimony of this witness as it appears in the record is very confusing. Some of it was given with reference to a plat which the witness had before him, and this evidence is entirely meaningless to us. We think the foregoing statement contains a synopsis of what the witness testified to.

John Schwartz testified that he was an eye-witness to the casualty and that the wagon struck one or two holes before the deceased was thrown off, and that his fall was caused by one of the wagon wheels dropping into a hole, which seems to have been between the rails of the south track of the street railway company. In any event, the witness testified that he showed the hole to the plaintiff, *Wanta,* the following morning, and *Wanta* testified that the hole shown him was between the rails of the south track. The latter also testified that this hole was about one and one-half by two feet in size and was six inches deep, and that he ascertained the depth by placing a stick forty inches long over the hole and measuring the distance with a rule from the bottom of the stick to the bottom of the hole. Witness said the stick was not real straight. Schwartz in testifying at the coroner's inquest seems to have located the hole between the rails of the north track, and at least to this extent there is some contradiction in his testimony.

There is no doubt that there were a number of holes in the street near where decedent met his death. One witness said there were as many as fifteen, and it is not seriously claimed that there were not some holes, because several were filled with fine gravel immediately after the accident. There was evidence offered by the defendants to show that the gravel had been cleaned out of these holes a few weeks afterward and a straight-edge placed over them and the depths measured by a civil engineer. He found eleven holes or depressions in the street in the vicinity of the place where the accident occurred, varying in depth from one inch to four and one-quarter inches. He located three of those between the rails of the south track, and found that the hole which *Wanta* evidently described was only one and three-quarters inches in depth. If this testimony is true, then there is no actionable negligence on the part of the city. *Kawiecka v. Superior,* 136 Wis. 613, 118 N. W. 192. If there was such a defect in the street as that testified to by *Wanta,* it is very clear from the decisions that the jury might find that it was not reasonably safe and that the defendant city was negligent in not repairing it. *Cremer v. Portland,* 36 Wis. 92; *Stilling v. Thorp,* 54 Wis. 528, 11 N. W. 906; *Schroth v. Prescott,* 63 Wis. 652, 24 N. W. 405; *Schroth v. Prescott,* 68 Wis. 678, 32 N. W. 621; *Brunette v. Gagen,* 106 Wis. 618, 82 N. W. 564; *Dralle v. Reedsburg,* 130 Wis. 347, 110 N. W. 210.

This court has often held that the testimony of disinterested and unimpeached witnesses on subjects like measurements and distances, and which is based on memory or casual observation and is at best only an estimate, must yield to that which is based on actual measurement. The estimate in such a case may and generally should be disregarded. *Burroughs v. Milwaukee,* 110 Wis. 478, 86 N. W. 159; *Koepke v. Milwaukee,* 112 Wis. 475, 88 N. W. 238; *Konkel v. Pella,* 122 Wis. 143, 99 N. W. 453; *Busse v. State,* 129 Wis. 171, 173,

108 N. W. 64. Respondents invoke this rule of law to sustain the judgment. It would not seem to be applicable. *Wanta,* if he told the truth, made an actual measurement as well as Webster did. The stick which he used for a straightedge might not have been exactly straight, but the jury might well have found that it was substantially so. His measurement was made the day after the accident, while the Webster measurement was made several weeks thereafter and after the holes had been filled up with fine gravel, although the testimony strongly tended to show that the gravel had been removed from the holes before the measurements were taken. It would seem to be apparent that there is a question as to the credibility of those two witnesses, which the jury and not the court should settle. It is true that Webster produced the measurements which he made on the trial and that *Wanta* did not, and that the latter said he had either lost or mislaid the figures which he made. The failure to produce the memorandum did not make the testimony of *Wanta* mere guesswork or the figures which he made a mere estimate. Assuming that he made the measurement to which he testified, he knew accurately just what the depth of the hole was when the measurement was made. Having gone to the spot for the purpose of ascertaining the depth of this hole, there is nothing remarkable about the witness remembering just what that depth was. The information was procured for use in a lawsuit and would be apt to leave a distinct and lasting impression on the mind. There is a material difference between the testimony of a witness who says that he observed a certain hole a year before and that his present recollection is that it was about two feet deep but that he did not measure it, and that of a witness who says that the hole was three feet deep and that he knows this to be the fact because he measured it a year ago, and, while he did not preserve the figures, he remembers what they were. The one witness never had any

accurate knowledge of what the fact was, while the other did, and the only question is whether his memory accurately retained that knowledge. This is the real distinction drawn between the two kinds of testimony in the cases cited. This court has not said that, where a witness testifies that he made a measurement and remembers what it was, although he is unable to produce it, such evidence must be disregarded if another witness testifies to making the same measurement and produces the figures which he claims to have made at the time. The failure to preserve the figures might affect the weight of the evidence, but nevertheless a jury might believe it if they saw fit. While we are not unmindful of the deference which this court should show to the decision of the trial court on a question of this kind, we think that the jury should have been permitted to pass upon the relative credibility of the testimony referred to.

It is urged in the brief of counsel for the city that the deceased was guilty of contributory negligence, and that the judgment of the circuit court should stand for this reason if for no other. Had there been but a single hole in the asphalt at this street intersection this argument would be quite persuasive, because there was apparently nothing to prevent the driver from seeing and avoiding it. If the holes were as plentiful at this point as some of the witnesses said they were, it might well be difficult, if not impossible, to dodge all of them, and a jury might acquit the deceased of contributory negligence on this ground, as we do not think it was so obviously dangerous to pass over this street that the deceased should be held negligent in attempting to go over it at all. *Lines v. Milwaukee,* 147 Wis. 546, 133 N. W. 592.

We see no necessity for passing upon the rights and liabilities of the defendants as between themselves, and we do not do so. We hold that there was evidence from which the jury might have found that the street was not reasonably safe and that the deceased was not guilty of contributory negligence,

and that therefore it was error to direct a verdict against the plaintiff.

By the Court.—Judgment reversed, and cause remanded for a new trial.

On February 20, 1912, upon a motion made on behalf of the *Milwaukee Electric Railway & Light Company,* the above mandate was modified, without costs, by adding thereto the following:

"Costs on this appeal to be taxed against the city only, provided that in case of final judgment in this action in plaintiff's favor against the *Milwaukee Electric Railway & Light Company,* said judgment shall also include a provision that the city recover against said last named company the costs taxed on this appeal, with interest."

TIMLIN, J., took no part.

OTJEN and others, Respondents, vs. FROHBACH and others, Appellants.

December 7, 1911—February 20, 1912.

Trusts and trustees: Creation of trust: Essentials: Wills: Construction: Estate or interest devised: Life estate with power to use and consume: Guardians for minors: Right of divorced wife to appoint: Testamentary trustee.

1. **No particular form of words, and not even the use of the words "trust" or "trustee," is necessary to create a trust; and, on the other hand, the use of those words does not necessarily show an intention to create one.**
2. **To create a valid trust the intent so to do must be clear and the writing employed must be reasonably certain in respect to the subject matter or property embraced within the trust, the bene-**

ficiaries or persons in whose behalf it is created, the nature and quantity of their interests, and the manner in which the trust is to be performed.

3. While adjudicated cases are sometimes helpful upon a question of testamentary construction, the guiding principle must always be to ascertain and enforce the intent of the testator as gathered from the particular will to be construed.

4. Testatrix, divorced from her husband and having the custody of their minor son and daughter, after making some small bequests, gave all the rest and residue of her property, real and personal, to said children, or to the survivor of them, share and share alike, during their natural lives and the life of the survivor, with the right to use and consume such part of his or her share as either of them should find necessary,—with remainders over. *Held*, that the children took a life estate with power to control and dispose of the property unincumbered by any trust.

5. The power to "use and consume," declared in the will, gives the right to use the *corpus* of the estate and necessarily carries with it the power to sell the personal estate absolutely and convey the fee of the real estate, together with the right to the possession and control of both.

6. Whether or not testatrix had a legal right, as against her divorced husband, to appoint a testamentary guardian over the persons of their children, whose custody had been awarded to her, she had the power, as incident to the disposition of her property, to vest the title thereto in a so-called guardian, and the naming of a person as guardian for the children in her will merely made such person a trustee of their property during minority.

APPEALS from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed in part.*

Two appeals were taken in this action, one by the plaintiffs and the other by the defendant *Hugo O. Frohbach* individually and as general guardian of the defendants *Harold O. Frohbach* and *Mabel Tenie Frohbach* from a judgment of the circuit court for Milwaukee county construing the will of Laura A. Frohbach, deceased.

The testatrix, Laura A. Frohbach, was married to the defendant *Hugo O. Frohbach* in June, 1895. Two children,

Harold O. Frohbach and *Mabel Frohbach,* were born to them, who at the time the will was executed were respectively nine and five years of age. On September 18, 1905, the testatrix obtained a judgment of divorce against the defendant *Hugo O. Frohbach,* and the custody of the children, *Harold* and *Mabel,* then seven and three years of age, was given to their mother. On September 26, 1906, the defendant *Hugo O. Frohbach* married one Lucile Moyer, with whom he has since resided and now resides in Ashland, Oregon. On November 22, 1906, the testatrix made and executed the will in question. On April 28, 1907, the testatrix died, leaving her two children as her only heirs at law. Thereafter the will was duly admitted to probate. *Laura W. Potter,* named as one of the executors, having declined to act, letters were duly issued to *Theobald Otjen* and *Retta Crowns,* the other executors named in the will. *Hugo O. Frohbach* was duly appointed general guardian of the person and estate of the two children. The estate of the testatrix consists of real and personal property in Wisconsin of the value of about $40,000.

The will, omitting the formal portions, is as follows:

"II. I give and bequeath to my daughter, *Mabel Tenie Frohbach,* all my silverware, jewelry, and personal ornaments, and to my son, *Harold Otto Frohbach,* the gold watch which I had from my father, and all the rest and residue of my property, real or personal, in possession or expectancy, I give, devise, and bequeath to my said son and daughter, or to the survivor of them, share and share alike during their natural lives and during the life of the survivor of them, with the right to use and consume such part of his or her share as either of them shall find necessary, and if either my said son or my said daughter should after my decease die without issue, his or her share shall go to the survivor of my said children for life, and if both my said son and daughter die after my decease leaving no issue of either living at the time of the death of the last survivor, then the whole residue and remainder of my estate shall go over to the persons and in the proportions specified in the next paragraph hereof. If

either my said son or my said daughter shall die before my decease or after my decease leaving issue, such issue shall take absolutely all the share which the parent of such issue had at the time of the death of such parent or such share as the said parent would have had if he had survived me, as the case may be. If neither my said son nor my said daughter nor any issue of either survive me, then absolutely to the persons and in the proportions named in the next paragraph hereof.

"III. In case (1) that neither my said son nor my said daughter nor any issue of either survive me, (2) or in case either or both my said son and daughter do survive me, but after my death and at the death of the last survivor of my said son and daughter there be no issue living of either my said son or my said daughter, then and in either of these two cases I give, devise, and bequeath as follows:

"(a) One third of all my property to my stepmother, *Laura W. Potter,* if she be then living, if she be not then living said one third to my half-sister, *Mabel Bjorkquist,* and if neither *Laura W. Potter* nor *Mabel Bjorkquist* be then living, to the heirs at law of *Mabel Bjorkquist.*

"(b) One third of all my property to my aunt, *Retta Crowns,* of Port Washington, Wisconsin, if she be then living, and if she be not then living, said one third to the heirs at law of said *Retta Crowns.*

"(c) One third of all my property to my uncle, *George Ingersoll,* if he be then living, and if he be not then living said one third to his two eldest children, *Clara Ingersoll* and *George B. Ingersoll,* share and share alike, if they be then living, but if either said *Clara* or *George* be then dead, to their or either of their living issue in the same proportion, and if neither said *Clara* or *George* nor the issue of either be then living, then in that case to the heirs at law of my said uncle, *George Ingersoll.*

"IV. If neither my son, *Harold,* nor my said daughter, *Mabel,* nor any issue of either shall survive me, or in case both my said son and daughter do survive me, but after my death and at the death of the last survivor of my said son and daughter, there be no issue living of either my said son or my said daughter, then in either of these two cases I give, devise, and bequeath as a specific legacy to *Mary E. Selmer,*

of Port Washington, Wisconsin, if she be then living, or to her issue if she be not then living, and have issue then living, the sum of two thousand dollars, to be paid within six months from my death, but if said *Mary E. Selmer* or her issue be not then living, then this two thousand dollar legacy shall lapse.

"V. I do hereby nominate and appoint *Laura W. Potter* as guardian of the person and estate of my said two children if I die during their minority, and if the said *Laura W. Potter* does not survive me, then and in that case I do hereby nominate and appoint said *Retta Crowns* of Port Washington, Wisconsin, as guardian of the person and estate of my two children in the like case.

"VI. I do hereby nominate and appoint the said *Laura W. Potter,* the said *Retta Crowns,* and *Theobald Otjen* and the survivors or survivor of them the executors of this my last will and testament, and I request that neither of them be required to give bond as such executors.

"In witness whereof I have hereunto set my hand and seal this 22d day of November, A. D. 1906.

"LAURA A. FROHBACH. (Seal.)"

The circuit court found substantially the facts as above set forth and also the following conclusions of law:

"That it was the intention of the said Laura A. Frohbach, as disclosed by her said last will and testament, to create a life estate in her children, with remainders over to their issue, if any, and in the event of her children dying without issue, then after paying a legacy of two thousand dollars to *Mary E. Selmer,* if living, and to her issue in case of her death, the estate was to be distributed equally between *Laura W. Potter, Retta Crowns, George Ingersoll,* and their respective heirs in case of their death.

"That in and by the terms of the said will of the said Laura A. Frohbach a valid trust was created for and during the life of the said *Harold O. Frohbach* and *Mabel Tenie Frohbach,* and the survivor thereof.

"That in and by the terms of the said will of Laura A. Frohbach, deceased, there was no valid appointment of a testamentary guardian for the said *Harold O. Frohbach* and *Mabel Tenie Frohbach.*

"That the executors named in said will took and now have the legal title to the property therein described, for and during the said trust term, upon the trust to care for and manage the estate devised; to receive the rents, income, and profits thereof, and out of the same to pay all taxes, costs, repairs, and expenses incident to managing the said estate, and the net amount of such rents, income, and profits to be divided equally between the said *Harold O. Frohbach* and *Mabel Tenie Frohbach,* share and share alike, or the heirs of either of them as the case may be, until the expiration of the trust term.

"Let judgment construing said will in accordance with these findings be duly entered, with costs to be paid out of the estate of the said deceased."

For the plaintiffs and appellants *Theobald Otjen* and *Retta Crowns,* as executors, and *Laura W. Potter,* as testamentary guardian, there was a brief by *Otjen & Otjen* and *Kronshage, Goff, Fritz & Hannan,* attorneys, and *Guy D. Goff,* of counsel, and oral argument by *Guy D. Goff.*

For the defendant *Hugo O. Frohbach* there was a brief by *McElroy & Ferguson,* and oral argument by *W. J. McElroy* and *H. T. Ferguson.* They argued, among other things, that the policy of the law of testamentary guardianship, as well as the express and unmistakable language of secs. 3964, 3965, Stats. (1898), is against any construction allowing the mother, during the life of the father, to appoint a testamentary guardian for their children. *Taylor v. Jeter,* 33 Ga. 195, 81 Am. Dec. 202; *In re Coons,* 20 Ohio Cir. Ct. 47; *McKinney v. Noble,* 37 Tex. 731; *S. C.* 38 Tex. 195; *In re Waring's Will,* 46 Misc. 222, 94 N. Y. Supp. 82; *In re Neff,* 20 Wash. 652, 56 Pac. 383; *Hill v. Hill,* 49 Md. 450, 33 Am. Rep. 271; *Ex parte Bell,* 2 Tenn. Ch. 327; *Ingalls v. Campbell,* 18 Oreg. 461, 24 Pac. 904; *Ex parte Edwards,* 3 Atk. Ch. 519.

For the respondents *Otjen* and others, upon the appeal of *Hugo O. Frohbach,* there was a brief by *Otjen & Otjen* and

Kronshage, Goff, Fritz & Hannan, attorneys, and *Guy D. Goff* and *S. J. M'Mahon,* of counsel, and oral argument by *Guy D. Goff.*

There was also a brief and oral argument by *Edgar L. Wood* as guardian *ad litem* of *Harold O. Frohbach* and *Mabel Tenie Frohbach.*

KERWIN, J. The appeals in this action present two main questions for determination: (1) The character of the estate devised and bequeathed to the children by paragraph II of the will; and (2) What effect shall be given to paragraph V of the will, which undertakes to appoint a general guardian of the person and estate of the children of the testatrix during their minority.

The court below, upon the facts which are undisputed, concluded that it was the intention of the testatrix as disclosed by her will to create a life estate in her children with remainder over to their issue, if any; and in the event of the death of her children without issue, then to others specified in the first conclusion of law set forth in the statement of facts; that in and by the terms of the will a valid trust was created for and during the life of the children of the testatrix, *Harold O.* and *Mabel Tenie Frohbach,* and the survivor thereof.

On the part of the defendant *Hugo O. Frohbach* it is contended that by the terms of the will, coupled with the surrounding circumstances, it is clear that no trust was created, but that the property passed unhampered to the children during their lives, with power to consume the same as they might deem necessary, hence that they had absolute power to convey a fee title, and were vested with the possession and control of the property; while on the part of the plaintiffs it is argued that a trust was created.

Both parties rely upon the same facts to support their respective contentions. It is also conceded by all parties that the intention of the testatrix as gathered from the four cor-

ners of the will, in connection with the surrounding circumstances, must govern in the construction of the instrument. Counsel do not disagree materially upon the general rules of law involved, but only as to the application of these rules to the facts of the case. It is true, as insisted by counsel for plaintiffs, that no particular form of words is necessary to create a trust. A trust may be created without the use of the words "trust" or "trustee," and, on the other hand, the use of the words "trust" or "trustee" do not necessarily show an intention to create or declare a trust. The intention to create a trust must be clear, and the writing employed must be reasonably certain in its material terms; "and this requisite of certainty includes the subject matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interests which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail." 3 Pomeroy, Eq. Jur. (3d ed.) § 1009. The general rule has often been stated by this and other courts as shown by the numerous cases cited by counsel. *Holmes v. Walter,* 118 Wis. 409, 95 N. W. 380; *In re Will of Kopmeier,* 113 Wis. 233, 89 N. W. 134; *Ford v. Ford,* 70 Wis. 19, 33 N. W. 188; *Scott v. West,* 63 Wis. 529, 559, 24 N. W. 161, 25 N. W. 18; *Allen v. Boomer,* 82 Wis. 364, 52 N. W. 426; *Tobias v. Ketchum,* 32 N. Y. 319; *Bradley v. Amidon,* 10 Paige Ch. 235; *Brewster v. Striker,* 2 N. Y. 19; *Toronto G. T. Co. v. C., B. & Q. R. Co.* 123 N. Y. 37, 25 N. E. 198; *In re Matter of James,* 146 N. Y. 78, 40 N. E. 876. The foregoing and other cases are relied upon by plaintiffs as establishing a trust under the will in connection with the admitted facts. And it is argued that from the terms of the will, in the light of all the surrounding circumstances, it is manifest that the testatrix intended to create a trust, and that all the essential elements of a testa-

mentary trust are present, namely, a desire that her children should have simply a life estate with remainder over, a sufficiently definite subject, the specification of all her property, and the command that it should definitely and absolutely vest in the issue of her children, or, in default of such issue, then over as provided in the will. It is further argued that in order to carry out the intention of the testatrix and preserve the *corpus* of the estate a trust is necessary. This brings us again to the all-dominant rule in the construction of wills, the intention of the testator, to be gathered from the particular will to be construed. *Allen v. Boomer,* 82 Wis. 364, 52 N. W. 426; *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 650; *In re Donges's Estate,* 103 Wis. 497, 79 N. W. 786; *Davies v. Davies,* 109 Wis. 129, 85 N. W. 201; *In re Albiston's Estate,* 117 Wis. 272, 94 N. W. 169. As this court said in *Albiston's Estate, supra,* the question presented in such cases is simply one of construction of a will, and that while adjudicated cases are sometimes helpful upon such a question, the guiding principle must always be to ascertain and enforce the intent of the testator as gathered from the particular will to be construed.

The language of the will under consideration is clear and unambiguous. After some minor bequests the testatrix gave all the rest and residue of her property, real and personal, in possession or expectancy, to her son and daughter or to the survivor of them, share and share alike, during their natural lives and during the life of the survivor of them, with the right to use and consume such part of his or her share as either of them shall find necessary. There would seem to be no room for construction on this language. The children take a life estate with the right to use and consume such part as either shall find necessary. There is no intimation of any trust in the language used, and none can be inferred from the will when read in the light of surrounding circumstances. The surrounding circumstances rather repel than support any

intention to create a trust. The divorce from her husband and his speedy marriage were well calculated to alienate the affections of the testatrix from him. Obviously her affections were centered upon her two children. Her other relatives are distant. It is most natural, therefore, to infer that the testatrix's ruling passion was for her children, and that they should enjoy without restraint her property, not only the income therefrom, but such part of the *corpus* as they should find necessary to consume, preserving such remainder only as was not used by her children. It is clear from the terms of the will, read in the light of the surrounding circumstances, that the intention of the testatrix was that her children should have a life estate with power to control and dispose of the property unincumbered by any trust. The authorities, we think, support this conclusion as to the real estate and personal property devised and bequeathed.

The case of *Bamforth v. Bamforth,* 123 Mass. 280, approved by this court in *Larsen v. Johnson,* 78 Wis. 300, 47 N. W. 615, as regards the real estate devised is strongly in point. In that case the will provided: "I give and bequeath to my parents, Samuel and Betty Bamforth, the use and improvement of all my estate, both real and personal, of which I may be possessed at the time of my decease, and so much of the estate itself as may be necessary for their comfortable support so long as either of them shall live," with remainders over to other relatives. The court in its opinion said:

"The legal effect of the testator's disposition of his real estate is as follows: He first gives his parents an estate for life. He also gives them 'so much of the estate itself as may be necessary for their comfortable support so long as either of them shall live,' thereby giving them a power to dispose of so much of the fee as may be necessary for that purpose; and whether their determination upon such question of necessity is or is not conclusive, no trust is created in them or in the executor."

In *Larsen v. Johnson, supra,* Larsen died leaving a widow and no children, and leaving land in Racine county which

by his will he gave to his wife, "to be for her sole use and benefit so long as she shall live, with power to dispose of the same if it shall be necessary for her support and comfort in this life." He also bequeathed to her certain kinds of personal property for life, and his goods and chattels generally to be hers forever. The residuary clause of the will was: "Whatever remains after her death shall go to the heirs of him and her in the manner provided by the laws of this state." His only heirs were his two brothers and the children of two deceased brothers. It was held in the above case that the power given enlarged the estate devised to a fee, and that the widow, the contingency arising, could convey a fee. The court said (page 307):

"If the widow had the power to dispose of the *corpus* or fee of the estate, on the condition or contingency of its necessity for her support and comfort, and the evidence shows that such a contingency arose, then the title of the respondent is perfect."

The respondent claimed under conveyance from the widow. It will be noted that in *Larsen v. Johnson, supra,* the power to dispose was given "if it shall be necessary for her support and comfort in this life," while in the instant case, after giving a life estate, the will further gives the right "to use and consume such part of his or her share as either of them shall find necessary." In *Auer v. Brown,* 121 Wis. 115, 98 N. W. 966, the testator devised all of his property to his wife for her life, with full power and authority to sell and transfer the same if she desired to do so; also to convert any of the real estate into personal property, and to use any or all of such estate as she may desire. The will also contained a residuary clause. This court held that under sec. 2108, Stats. (1898), the estate of the life tenant under the power before referred to was a fee, so that her deed conveyed a fee, and that the power of disposition conferred upon the donee was absolute under sec. 2112, and unaccompanied by any trust. We think in the instant case the children were vested with a life estate

in the real estate devised to them free from any trust. Nor do we think the personal property was disposed of in trust, but passed absolutely to the children of the testatrix. If a naked life estate had been granted, under the rule of *Golder v. Littlejohn,* 30 Wis. 344, doubtless the personal estate would vest in the executors, but here the gift was specific, and the clause, "with the right to use and consume such part of his or her share as either of them shall find necessary," applies to personal as well as real property. *Swarthout v. Ranier,* 143 N. Y. 499; *Harris v. Knapp,* 38 Mass. 412; *Dodge v. Moore,* 100 Mass. 335.

The right to use and consume, declared in the will, clearly gives the right to use the *corpus* of the estate devised and bequeathed, and therefore the power to sell the personal property absolutely and convey the fee in the real estate necessarily follows. *Perkinson v. Clarke,* 135 Wis. 584, 116 N. W. 229; *Murray v. Kluck,* 87 Wis. 566, 59 N. W. 137; *Larsen v. Johnson,* 78 Wis. 300, 47 N. W. 615; *Johnson v. Battelle,* 125 Mass. 453; *Leggett v. Firth,* 132 N. Y. 7, 29 N. E. 950; *Allen v. Hirlinger,* 219 Pa. St. 56, 67 Atl. 907; 31 Cyc. 1044–1048 and cases cited.

And where "it can be gathered from the will that the testator intended that the legatee for life should enjoy the property in its then condition, the bequest is specific, and the legatee is entitled to the possession and enjoyment of the property thus specifically bequeathed, although the bequest be made in general terms and without any particular designation of the property." *Golder v. Littlejohn,* 30 Wis. 344; *Pierce v. Stidworthy,* 81 Me. 50, 16 Atl. 333; *In re Garrity's Estate,* 108 Cal. 463, 38 Pac. 628, 41 Pac. 485; *Scott v. Scott,* 137 Iowa, 239, 114 N. W. 881; *Park's Adm'r v. American H. M. Soc.* 62 Vt. 19, 20 Atl. 107; *Harris v. Knapp,* 38 Mass. (21 Pick.) 412; *Dodge v. Moore,* 100 Mass. 335.

Counsel for respondent appear to rely strongly upon *Allen v. Boomer,* 82 Wis. 364, 52 N. W. 426. But it will be seen

that the will in that case not only bequeathed the entire estate of the testatrix, Charity Allen, but also bequeathed out of her own and her husband's estate sums necessary for support and education of certain persons according to a mutual agreement referred to in the will and stated to be expressed in his will, with a clause that all the property left "that was mine or my husband's shall be divided between his and my legal heirs, one half to his heirs and one half to mine." At the same time the husband of the above named testatrix executed his will in similar terms in which he devised all of his property to his wife, making charges upon the two estates. The wife died first, and it was held that under her will the husband took only a life estate in her property, and that the estate of the husband was held in trust for his heirs and the heirs of his wife as specified in her will. The foregoing facts and others appearing in the case show that it does not apply to the situation now before us.

Upon this branch of the case we conclude that the will of Laura A. Frohbach gives to her children, *Harold O.* and *Mabel Tenie Frohbach,* each a life estate in one half of the residuary estate of the testatrix, with the power to sell, use, and consume such portion as either shall find necessary; and that said children of the testatrix have the right to the possession and control of the property, subject to management during their minority by a guardian or trustee as more definitely specified hereinafter in treating plaintiffs' appeal.

Some point is made by counsel as to the rights of remaindermen, and while it seems to be conceded that there is no controversy as to their rights, it is said that the findings and judgment of the circuit court do not clearly state such rights. It is true that the findings and judgment are quite general as to the rights in remainder, but since there is no controversy upon the subject we cannot see that more detailed specification is necessary.

Plaintiffs appeal from that part of the judgment which ad-

judges that there was no valid appointment of a testamentary guardian for *Harold O.* and *Mabel Tenie Frohbach.* This presents a question not free from difficulty. It is contended on the part of the defendant that it is the settled law of this state, under sec. 3964, Stats. (1898), that the father has the *prima facie* right to guardianship (*Markwell v. Pereles,* 95 Wis. 406, 69 N. W. 798); that under sec. 3965 the father, if living, and, in case of his death, the mother of every minor child may by last will in writing appoint, and that the paramount right of the father will be recognized (*Welch v. Welch,* 33 Wis. 534); also that the right of testamentary disposition is the creature of statute, and that in a divorce proceeding the court has no authority to take the child from the parents and give it to a stranger (*McCabe v. McCabe,* 126 Wis. 154, 105 N. W. 665). It is therefore argued that the mother had no power to appoint a testamentary guardian for her children. On the part of the plaintiffs it is insisted that under the terms of the judgment of divorce the care and custody of the children were given to the testatrix during minority or until the further order of the court, and that this judgment suspended the power of defendant over the children, hence the mother had the right to appoint, relying upon *In re Guardianship of McChesney,* 106 Wis. 315, 82 N. W. 149; Hochheimer, Custody of Infants; *Wilkinson v. Deming,* 80 Ill. 342; secs. 3964, 3965, Stats. (1898). It is also insisted that even though the mother had no power to appoint a testamentary guardian over the person of the children, the appointment should be held valid as to the property.

The court below adjudged that by the terms of the will there was no valid appointment of a testamentary guardian for the minors. It does not seem necessary to discuss or decide the question whether a married woman has the right to appoint a testamentary guardian over the person of her children.

Whether the absconding of the father, or the award of the custody of the children by the judgment of divorce to the

mother, was sufficient to authorize her to make the testamentary appointment as to the person of the minors, we need not and do not decide. Mrs. Frohbach had ample capacity to dispose of her property by will. Incident thereto she was competent to vest the title in the so-called testamentary guardian as a trustee for the minors. As we construe the will, that is all she did. The nature of the status of *Laura W. Potter* created by the will is not materially affected by the mere characterization of it in the instrument. Regardless of such characterization, she was made merely the trustee of the property of the minors during their minority. *Laura W. Potter* is entitled to take and hold the property for the minors during minority, and in so far as the judgment is to the contrary it is wrong.

By the Court.—The judgment so far as in conflict with the foregoing is reversed on both appeals, and the cause is remanded with directions to the court below to correct and reenter the judgment in accordance with this opinion.

TIMLIN, J., took no part.

JEFFERS, Administratrix, Appellant, vs. GREEN BAY & WESTERN RAILWAY COMPANY, Respondent.

January 30—February 20, 1912.

Trial: Directing verdict: Appeal: Review: Evidence: Uncontradicted testimony: Weight: Physical circumstances: Railroads: Death of switchman: Kicking cars: Misleading orders: Negligence of foreman: Contributory negligence: Unsafe place: Proximate cause: Questions for jury.

1. It is the duty of the trial court, if convinced that there is no fair ground in the evidence for a determination in favor of the plaintiff, to direct a verdict for the defendant.
2. Such a decision of the trial court will not be disturbed on appeal unless manifestly wrong. Even if not right upon the ground

upon which it was made, it may be right upon some other ground.

3. One physical situation demonstrated to have existed, or one circumstance established beyond any reasonable ground for doubt, may outweigh the most positive uncontradicted evidence of one or any number of witnesses.

4. Plaintiff's intestate, a switchman, was killed by being precipitated from the top of the fifth of a string of cars, which were being pushed southward in defendant's yard, when the sixth, or most southerly, car was kicked upon a switch track. There was undisputed testimony that, as the sixth car had about reached a cross street, the deceased mounted the northwest corner of that car and was seen standing thereon, and similar testimony that, at a point north of the center of the street, he ascended the ladder at the northeast corner of the fifth car,—the latter testimony being corroborated by the certainty that he was on the fifth car at the fatal moment. The trial court concluded that after mounting the sixth car the deceased had gone down the ladder at the northeast corner thereof and had mounted again at the northeast corner of the fifth car and was proceeding on the top thereof towards the sixth car when the accident happened, and directed a verdict for defendant on the ground that deceased had gone out of the proper course without any reason therefor. *Held* that, in view of the unreasonableness of such movements and the inadequacy therefor of the time in which they must have been made if at all, the jury would have been warranted in finding that deceased did not mount the sixth car at all; and that the court should not have directed the verdict upon the theory on which it did.

5. The jury might also have found that the deceased mounted first the fifth car at the northeast corner and was proceeding on the top thereof towards the sixth car, supposing that the sixth car was to be spotted on the switch track or that notice would be taken of his position before the stop signal was given to the engineer; and that in so doing he was not acting contrary to orders and was not negligent.

6. Upon the evidence above stated and evidence showing, among other things, that the deceased was not accustomed to yard work and had worked but part of one day in this yard, that the particular ways of the yard were not explained to him, and that the foreman in giving the orders under which deceased was acting had used terms which were likely to mislead as to whether the sixth car was to be kicked or spotted, the jury might reasonably have found that deceased was misled by the negligence of the foreman as to the nature of the movement

to be executed; that the foreman was also negligent in not observing whether deceased was on the sixth car before giving the signal to stop the other cars; that the working place of deceased was not reasonably safe under the circumstances; and that such negligences, or some of them, proximately caused the accident. It was error, therefore, to take the case from the jury.

APPEAL from a judgment of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Action to recover for the claimed negligent killing of Louis Jeffers.

The deceased was an experienced brakeman but not accustomed to yard work, particularly in defendant's yard at Green Bay, where he was killed. He was familiar with switching movements, called kicking, as well as those called spotting cars. At his request he was transferred from regular freight train service to the particular work. The fatal accident occurred during his first day's work and the first time he received such an order as the one in question. He had before performed like service but not, perhaps, in a yard where there was a scale track called the "scale" or "scales." He did not ask for instructions. None were given. There were no particular circumstances indicating that he required such other than the local custom respecting the name of the particular track. The work in progress when the accident occurred was being done in the ordinary way in the particular yard. There was evidence to show that the cars were moving pretty fast,—perhaps more than ordinarily so. The switching crew was composed of Gallagher, the foreman, Jeffers, the deceased, and one Boex, a switchman, besides the men on the engine. There was a string of six cars attached to the switch engine in front. It was on a lead track connected with two or more switch tracks to the south. The last car from the engine was a short distance north of a cross thoroughfare, called Mason street. The purpose was to move the cars southerly across the street and set the sixth in on the switch

track, known as the "scale" or "scales." That was a designation given to the track by the custom in the yard. It turned to the left about 100 feet south of the street. There was a slight easterly curve in the lead track, the degree of curve being such as to enable the engineer from his ordinary position, to see a person, if standing in the street near to and west of the track, or in the act of climbing on the sixth car on such side, or perhaps if on top of the car or the one next to it. There was undisputed oral evidence that before the movement commenced the foreman and Jeffers were in pretty close company west of the track and north of the street. The foreman signaled the engineer to move southerly. A set of weighing scales intercepted the "scale" or "scales" track some twenty rods southerly of the street. There was ground for one circumstanced as Jeffers was, to understand an order to put a car in on the "scales" or ride a car in on the "scales," to refer to the weighing scales, when the idea might be to put the car on the track on which the weighing scales were located. The purpose at the time in question, was, as testified by the foreman, to place the car on the "scales" track by a kicking movement. That is, giving the string of cars such speed that, at a proper point and time, the particular one could be released and the rest suddenly brought to a stop, allowing the former with the brakeman thereon to continue to a suitable clearance on the "scale" track and be there stopped by his setting the brake. In a movement to place a car on the weighing scales, called "spotting," the evidence tended to prove that the car would not be detached till in position and the brake set, or something done, if necessary, to prevent its moving by gravity. So, in a spotting movement, it was safe for the brakeman to mount a car next to the particular one on the way to the latter, while in a kicking movement if he did so and in attempting to pass to the particular car, reached a point near the division between the two at the instant of the release and stop order, he was almost sure to be thrown forward to the

ground and severely injured, if not killed. There was evidence to the effect that, ordinarily, there was little if any difference between the language of a kicking order and that of a spotting order. The foreman testified that in case of the latter, with reference to the scales the word "spot" would be used and nothing be said about setting a brake or riding the car. His associate testified that the proper order "would be 'ride this car and set a brake on it on the scales;' that would mean a spot, not a kick. It would mean to 'ride the car.'" It was of vital importance for the brakeman to understand the nature of the movement as to whether the car was to be spotted or kicked and to so shape his course as to be on the particular car in case it was to be kicked at the time of the engineer's response to the stop signal and to be so located as to guard against an inefficient effort to release the car, resulting in its being suddenly brought to a stand with the rest.

There was no rule or general custom in the yard by which one circumstanced like the deceased could understand, with certainty, from the language of the order given whether a kicking or a spotting movement was to be executed. He might fairly in this case have supposed it to be the latter and so that it was safe to pass from the fifth to the sixth car while the string was being pushed down to place the latter car on the weighing scales. There was evidence tending to show that the method of designating the particular track was not only local but that the characterization in common use was "scale," not "scales." The foreman testified that the latter was the usual term while the superintendent testified that the former was the one commonly used.

About as the movement commenced the foreman said, speaking to Jeffers, "Ride the car" or "this car," or used words of similar import, "in on the scales and set the brake and then go to dinner." The witness testified variously as to the precise words he used, but there was no very material difference between his several phrasings of the matter.

There was undisputed oral evidence that Jeffers, as the southwest corner of the sixth car reached him, and about in Mason street, ascended the ladder and an instant later was seen on top; also that about the same time he was seen in Mason street on the east side of the track ascend the ladder at the northeast corner of the fifth car and proceed rapidly towards the sixth. After the foreman saw him, as he said, mount the sixth car and the string had attained the proper speed and was at the appropriate location, he released the particular car by using the appliance therefor at the side, gave the engineer the stop signal which was promptly obeyed, the five cars and the engine coming suddenly to a stand, the released car rapidly moving on and, at that instant, Jeffers plunging head foremost from the southerly end of the fifth car.

All the testimony as to Jeffers having mounted the sixth car was by the engineer, the foreman, and switchman Boex. The latter testified to having seen Jeffers standing on top of the sixth car while the foreman was running with the string in readiness to give the stop signal. The one who testified to having seen the decedent mount the fifth car, was a man of mature age who had long been a resident of Green Bay. The effect of his evidence was that the cars were under his observation throughout, the whole occupying but a short time; that he saw Jeffers at a point north of the center of Mason street, on the east side of the track, ascend the ladder at the northeast corner of the fifth car and go rapidly towards the sixth, proceeding till he fell from the top; that when the man took hold of the ladder the cars were moving at a pretty rapid rate,—so rapidly that the foreman whose limbs he could see, had to run to keep up. The testimony of the foreman was the same as regards his running alongside of the car. He did so with his hand holding the switching appliance till the string reached the proper place and speed and then pulled the

pin and gave the engineer the stop signal. During this time he made no observation as regards the whereabouts of Jeffers. Most of the time he was, perhaps, where he could not have seen him except by moving back a little from the side of the cars.

All circumstances referred to are within the pleadings and the evidence. If all the oral testimony be true, Jeffers mounted the sixth car, then proceeded quickly, except for the instant Boex saw him standing still on top of the car, to the north end, descended to the ground at the northeast corner and in Mason street from which he went up the ladder at the corresponding corner of the fifth car, and proceeded rapidly back towards the sixth and met his death in doing so. The trial court adopted that theory. No one in charge of the movement, according to the evidence, saw Jeffers after he was observed by Boex, as he said, standing on the sixth car, till he fell from the fifth.

The negligence claimed is: (a) Conduct of the engineer and foreman in running the cars at an unusual rate of speed without giving proper attention as regards the location of Jeffers; (b) Suddenly stopping the car on which deceased was located without warning him that such an occurrence was impending or likely to happen; (c) Failure to furnish him a reasonably safe place to work; (d) Failure to instruct him as to the peculiar dangers of his work according to the custom in the particular yard.

The trial court held that, regardless of whether Jeffers understood what kind of a movement was to be executed, or whether the cars were moved at an unreasonable rate of speed, or the string after the sixth car was released, was stopped unusually quick,—he went out of his proper course without any reason therefor and came to his death thereby. Upon that theory the verdict was directed for the defendant and judgment rendered accordingly.

For the appellant there was a brief by *Phillips & Hicks,* attorneys, and *Glicksman, Gold & Corrigan,* of counsel, and oral argument by *W. D. Corrigan.*

For the respondent there was a brief by *Greene, Fairchild, North & Parker,* and oral argument by *H. O. Fairchild.*

MARSHALL, J. Is it clear the trial court erred? It would not avail appellant for it to merely appear here, looking at the printed record alone, that the decision below is wrong. Balancing the mere record probabilities in the affirmative against those in the negative and adding to the latter the superior opportunities afforded the trial court, which could not be presented here, do the former outweigh the latter,—not merely appreciably, but so decidedly as to produce conviction that there can be only slight, if any fair, doubt about it?

It is recognized that in such circumstances as the trial judge faced, he is bound, in the performance of duty, to take the case from the jury if convinced there is no fair ground in the evidence for a determination in favor of the plaintiff. Efficient administration requires such duty to be met with courage, consideration, and firmness. To the end that such efficiency may be promoted as well as from the very nature of the matter, initial decisions, as in this case, should not be disturbed except for very substantial reasons. Recognizing that, it is the settled policy of this court, one so long adhered to as to have all the force of unwritten law, that the result below will not be disturbed unless not only wrong, but manifestly so.

In determining whether the decision in question will stand the test indicated, we must view it in two aspects: (a) Is it right, looking only at the ground on which it was made? (b) If it be not right on such ground, is it manifestly right on some other? The real right of the matter is the ultimate end to discover and effectuate, rather than the legitimacy of the logic upon which the result complained of was grounded.

It will be noted by the statement, that the circuit judge assumed, because witnesses testified, positively, to having seen Jeffers mount the sixth car and no one contradicted them, that such must be the fact. So that was set down as a verity. The testimony of the person, who gave evidence to having seen Jeffers mount the fifth car from the east side, corroborated by the certainty that he was thereon at the fatal moment, and the fact that such person was not disputed by the word of any other witness, was taken as true, beyond reasonable ground for dispute. So that was set down as a second verity. From such premises the trial court reasoned to the third verity, as was thought, that after going up the ladder to the top of the sixth car, the decedent traveled thereon to the northeast corner thereof, then down the ladder at that point to the street, such point being nearly as far north as he was before, then that he grasped the ladder at the northeast corner of the fifth car as it came to him, ascended to the top of such car and proceeded back to reach the sixth, and met his death in doing so.

In reasoning as indicated, it seems the fact was lost sight of or not given due consideration, that truth is not, necessarily, according to the evidence of one or more witnesses, however fair they may appear to testify, and notwithstanding absence of any direct conflict from the mouth of any other witness. One physical situation demonstrated to have existed, or one circumstance, established beyond any reasonable ground for doubt, may outweigh the most positive uncontradicted evidence of one or any number of witnesses.

Here we have physical situations and circumstances of the nature indicated, as follows: The man was on the fifth car going to the place to which he was assigned when the catastrophe occurred. No rational person could be reasonably expected to make such movements in the whole, as the trial court suggested. The time between the claimed ascent to the top of the sixth car and the certain ascent from the street to the top

of the fifth, was, under the circumstances, as a jury might reasonably conclude, so inadequate as to produce conviction that two ascents did not occur. Such time was, manifestly, too short, especially if the testimony of Boex, one of the witnesses relied on to sustain the result reached, that he saw Jeffers standing on the sixth car, is believable. "I claim," said the witness, "he was standing on the car doing nothing. He was not walking either way. Gallagher was running at that time alongside the south end of the fifth car." According to this, Jeffers was standing still on the sixth car at a time when, as there is evidence tending to show, it had cleared the street, or nearly so, the engineer had received the kick signal and speeded up the train, and the foreman was making ready to pull the pin, and yet Jeffers covered the length of the car, descended therefrom to the street, about as far north as the point of ascent, waited for the train to move the length of a car, bringing the northeast corner of the fifth one to him, then ascended to the top thereof and doubled back to near the south end by the time it reached a point about eighty feet south of the street where the fatality occurred,—all such movements being equivalent to traveling a greater distance than the foreman covered, who was on a run most of the time as there is evidence tending to prove. We cannot escape the conclusion that a jury, facing the situation pictured, might reasonably reject the whole theory upon which the decision was grounded as utterly improbable,—come to the conclusion that the ascent to the top of the sixth car as testified to by the foreman, the engineer, and Boex, did not occur.

Counsel for respondent present the contrary of the foregoing in its most favorable light, but, at the best possible for that side, only the major probabilities are in favor of the trial court's theory. The case is to be viewed in the most favorable aspect on the evidence for plaintiff. But, whatever viewpoint be selected for taking a survey of the situation, it seems clear beyond room for fair controversy, that the jury

might reasonably have come to the conclusion that Jeffers did not mount the sixth car at all but was on his way there for the first time at the fatal moment. The trial court, erroneously, as it seems, thought the testimony of the three witnesses to the contrary was wholly unimpeached and hence that all the other evidence was required to be harmonized therewith, if possible, and otherwise rejected. That was wrong; very clearly so, as we have seen.

It follows that the decision complained of cannot be supported on the ground on which it was made.

In examining the case further to determine whether the verdict be right, though grounded on untenable reasoning, we must assume, because a jury might have so concluded on the evidence, that at the moment the witnesses claimed to have seen Jeffers mount the sixth car, he, instead, crossed the track just before the car reached him and, a moment later, mounted the fifth car as the northeast corner came to him, and proceeded by way of the top thereof towards his destination on the sixth car, either supposing that the latter was to be spotted on the weighing scales or expecting that some efficient notice would be taken of his whereabouts before giving the stop signal to the engineer. There must be some explanation of his movements which occurred just before the fatal event, consistent with his not expecting, or from his viewpoint being bound to expect, that the movement of the cars which took place was about to happen. Otherwise, in view of the fact that he was an experienced railroad man, the conclusion would be inevitable that he was irrational or bent on committing suicide. Counsel for respondent seem to concede that, and to seek to escape from the dilemma by claiming that decedent's duty was to mount the sixth car and stay there till he set the brake, and that, had he done so instead of stepping aside, for some unexplained, and unexplainable, reason, and mounting the fifth car from the street on the east side, either originally or after having descended from the sixth car, he

would not have encountered the danger, and so defendant is not liable; since those in control of the car had no reasonable ground to suppose he would take any such course, or be elsewhere than on the sixth car when the stop signal was given.

The stated argument of counsel is in harmony with part of the trial court's logic, the key to which is that Jeffers in fact mounted the sixth car. That, the jury might reasonably have rejected, as we have seen.

We are unable to find any satisfactory basis in the record for counsel's theory that, if the decedent endeavored to reach his destination on the sixth car by going thereto by way of the fifth, mounting it from the east side, he disobeyed orders or was guilty, necessarily, of want of ordinary care; especially if he supposed his position would be observed or some warning would be afforded him before the stop signal was given to the engineer, moreover, if he supposed, and had reasonable ground therefor, that he was participating in a spotting movement. The order was not to mount the particular car and ride it in on the "scale track" and set the brake. True, he had to reach the top of the car in order to ride it and be in position to set the brake; but as suggested, we are unable to discover any certain evidence that it was contrary to orders or, necessarily, negligent for him to endeavor to reach his post by way of the fifth car.

We appreciate that for one circumstanced as Jeffers was to cross the track before the coming car and ascend from that side to the top of the fifth car and proceed thereon to his destination, seems somewhat strange; but such movements, as we have seen, would be far more reasonable than those supposed and upon which the verdict was grounded. Now is it not reasonable to conclude, that it was the duty of the foreman, before dropping the sixth car, to have had some satisfactory evidence that Jeffers had mounted it? That aspect of the matter seems to have been appreciated and, as was supposed, indisputable proof on the question made. If he was not seen

to mount the car, he must have so suddenly disappeared around the end of it, that the foreman had little, if any, ground to believe he had reached the top. In those circumstances we are not prepared to hold that the jury could not reasonably have decided, had the matter been left to them, that it was the foreman's duty to have made some effort to acquaint himself with the decedent's location before giving the stop signal. In such circumstances the case might well have been sent to the jury regardless of whether the design was to execute a spotting or a kicking movement.

So it seems the jury would have had ample ground to conclude that Jeffers supposed the car was to be spotted on the weighing scales. In that event his movements from his viewpoint, were not attended with any danger. Did he have reasonable ground for so supposing? If so, was his condition of mind attributable to fault of the foreman or others who should have instructed him?

It seems quite significant that there is ample evidence to sustain the theory that the particular track was known as the "scale," not the "scales." True, the evidence is perhaps not conclusive on this but is enough so to lead to the conclusion that the jury might properly have so found. The road superintendent testified, very positively, one way and the foreman the other. That being so, Jeffers, who was not familiar with the particular yard, or, so far as the evidence shows, with any where there was a track called the "scales" or "scale," may have thought the car was to be placed on the weighing scale and been misled in that regard by the foreman's use of the word "scales,"—the characterization, in common parlance, of weighing scales, instead of "scale," which might, perhaps, be fairly understood, without reference to the local custom, to mean the scale track. That Jeffers was in some way misled seems pretty certain. In any event the jury had fair room for such conclusion. He would not have taken the course which he did, as the jury might well have concluded, except

in the belief that the car was to be spotted. Now if the man was misled and so came to his death, whose fault was it? It seems there is ample ground for saying the mischief was caused by the foreman negligently using the term "scales" instead of "scale," especially under the circumstances of decedent's well known unfamiliarity with the yard and the particular local custom.

So in view of the suggested known want of experience of the deceased, and of the fact, so far as appears, that there was no rule or custom by which one circumstanced as the decedent was could determine a spotting from a kicking order with certainty, and the use of terms in giving orders quite likely to mislead as to the nature of the contemplated movement, and in view of the further fact that the particular ways of the yard were not explained to the deceased, we are constrained to hold that the jury might reasonably have come to the conclusion that Jeffers was misled by the negligence of the foreman; that there was further negligence in not taking some observation as to whether he was on the sixth car before giving the stop signal; also that his working place was not reasonably safe under the circumstances; and that such negligences, or some of them, were the proximate cause of the fatality or proximately contributed thereto. So the case is within the field of jury duty and the trial court clearly erred in deciding otherwise.

By the Court.—The judgment is reversed, and cause remanded for a new trial.

PORTAGE COUNTY, Respondent, vs. COLUMBIA COUNTY, Appellant.

January 30—February 20, 1912.

Change of venue: Expenses of trial: To what county charged: Statute construed.

1. Where a change of venue is had in any action, the county in which the action is tried cannot, under sec. 2940, Stats. (Supp. 1906: Laws of 1905, ch. 254), charge back the expenses of trial against any county other than the one in which the action was commenced; and not against that county if the change therefrom was made because the action was not properly brought therein.
2. Thus, where an action was brought in one county and the venue changed to another because the first county was not the proper place of trial, and thereafter the venue was again changed by stipulation to a third county, in which the action was tried, such third county cannot charge back the expenses of the trial against either of the other counties.
3. It cannot be held in such a case that the word "commenced" in the statute means *properly* commenced and that the action was not properly commenced until it reached the second county on change of venue,—such construction being negatived by the statute itself.

APPEAL from an order of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

One Pinkman, a nonresident of this state, began an action in the circuit court for Dane county against the Wisconsin Central Railway Company to recover damages for a personal injury sustained by him in a railway accident on the defendant's road in the state of Minnesota. Within the twenty days prescribed by sec. 2621, Stats. (1898), the defendant served upon plaintiff's attorney a demand in writing that the venue be changed because the lines of the defendant road do not extend into Dane county and it was therefore not the proper place of trial. Upon stipulation the venue was duly changed from Dane county to *Columbia County.* In that

county an issue was made up and the action remained there several terms. It was then stipulated to change the place of trial from *Columbia County* to *Portage County,* and an order was duly entered changing the place of trial to *Portage County* pursuant to the stipulation. The defendant's lines extend into both *Columbia* and *Portage* counties. The case was tried in *Portage County* and subsequently the costs of the trial, amounting to $604.90, were taxed against *Columbia County,* and by an order of the court allowed. *Columbia County* objected to the allowance against it of any costs for the reason that the action was not begun in *Columbia County;* that the cause of action did not arise therein, and the plaintiff was not a resident thereof; and it appealed from the order of the court allowing costs to be taxed against it.

Henry A. Gunderson, for the appellant.

George B. Nelson, for the respondent.

VINJE, J. In the absence of statutory provisions permitting it, a county wherein a case is tried cannot charge another county with the costs of trial. We must therefore look to the statute for authority to sustain the order appealed from. If we do not find it there, the order must be reversed. This result is clearly perceived and admitted by respondent's attorney, for he says: "This statute just quoted [sec. 2940, Stats.: Supp. 1906] is the law on which *Portage County* relies, and must necessarily rely, in asking an affirmance of the order appealed from." That section, as amended by ch. 254, Laws of 1905, so far as it is material to the question raised by this appeal, provides:

"In all actions or legal proceedings, including criminal actions, where a change of venue is had or made by the order of any court or of any judge, pursuant to law (except in cases where such change is made because the action was not brought in the proper county), or when an action, occupying a day or more, is tried outside the county wherein pending, the county

in which such action was commenced shall pay to the county in which the same shall be tried the following expenses arising out of such change of venue."

Both parties agree that the costs cannot be charged against Dane county because the statute expressly exempts it on the ground that the action was not properly brought there. An analysis of the statute will disclose that upon a change of venue the costs of trial can be charged back to but one county, namely, the county in which the action was properly begun. The legislative scheme deals only with counties in which the action was commenced, and it divides such counties into two classes, those in which the action was properly begun and those in which it was not properly begun, and it exempts the latter from liability. The result is that when an action is tried in a county on a change of venue that county must be able to find a county in which the action was properly begun in order to relieve itself of liability for the costs of trial. If it cannot find such a county it must bear the burden itself, for no provision is made for charging back the costs against any other county. In other words, the legislature has said: If the action was properly brought in the county in which it was commenced, such county can be charged with the costs of trial upon a change of venue, but if it was not properly brought there it cannot be charged. There the statute ends. It makes no provisions for charging the costs to any other county. A situation such as is before us in the instant case was not provided for. But it is said the court should construe the word "commenced" to mean *properly* commenced, and should hold that the present action was not properly commenced till it reached *Columbia County* on a change of venue. The insuperable obstacle to such construction is that the legislature recognized the fact that an action could be either properly or improperly commenced in a county by providing for a liability for costs in the one case and for exemption therefrom in the other; and that in fixing liability it did not

go beyond the county in which the action was commenced whether that was a proper or improper one. Hence we cannot extend the provisions of the statute by a construction that is negatived by the act itself.

It follows that sec. 2940, Stats. (Supp. 1906: Laws of 1905, ch. 254), did not authorize the trial court to tax costs against *Columbia County,* and the order must be reversed.

By the Court.—Order reversed, and cause remanded with directions to disallow the claim.

RICE, Respondent, vs. MURRAY and others, Appellants.

January 30—February 20, 1912.

Bonds: Performance of agent's duties: Payment for goods purchased.

A bond conditioned for the faithful performance of the duties of an agent who was expected to receive milk or cream from patrons of a creamery, convert it into butter, and account to the patrons for the proceeds actually received, after deducting the agreed pay for his services, does not guarantee payment for milk purchased outright from such patrons by him.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

For the appellants there were briefs by *E. E. Browne, W. E. Fisher,* and *H. J. Severson,* attorneys, and *A. E. Thompson,* of counsel, and oral argument by *Mr. Severson* and *Mr. Thompson.*

For the respondent there was a brief by *F. F. Wheeler* and *Martin, Martin & Martin,* and oral argument by *Mr. Wheeler* and *Mr. Joseph Martin.*

WINSLOW, C. J. This is an action at law against the defendants as sureties upon a bond in the sum of $3,000, given

by one Soli as principal to protect the patrons of a creamery owned and operated by said Soli. The bond ran to "the patrons" of the creamery as obligees, and was conditioned as follows:

"If the above bounden, G. E. Soli, shall well and truly pay or cause to be paid unto the above named patrons of the Spring Brook Creamery all sums that he receives for butter made from milk delivered by the patrons of the said Spring Brook Creamery, after deducting the sum of three (3) cents per pound for making said milk into butter, then the above obligation to be void, otherwise to remain in full force and virtue."

It appeared undisputedly in the evidence that Soli never did business as contemplated by the provisions of the bond. Instead of receiving the milk, manufacturing it into butter, and accounting to each patron for the sums received by him for such butter, less three cents per pound, he in fact purchased the milk outright. As soon as it was received he tested it by the Babcock test, and thus ascertained the amount of butter fat in it. From this he determined the number of pounds of butter it would make, added the overrun, and paid the patrons therefor at the Elgin current prices, less three cents per pound. The plaintiff was a patron who sued for milk delivered at the creamery by himself and by a large number of other patrons of whom he was the assignee, which had not been paid for by Soli.

The bond is clear and unambiguous. It is conditioned for the faithful performance of the duties of an agent who was expected to receive the patrons' milk or cream, convert it into butter, and account to the patrons for the proceeds actually received, after deducting the agreed pay for his services. It contains no provision of any kind guaranteeing that Soli would pay for milk which he might purchase.

There is a very marked difference not only in the legal character of the two relationships, but in the character of the risks assumed. In the bond as given the risk assumed was

only the risk of the honesty and faithfulness of the agent. If it were to be construed as guaranteeing payment for milk purchased, it would cover also the business sagacity and ability of the principal. *Sanitas Co. v. Niezorawski,* 138 Wis. 377, 120 N. W. 292.

A verdict for the plaintiff was directed, but it is plain that it should have been directed for the defendants, because the bond did not cover the transactions shown by the evidence.

By the Court.—Judgment reversed, and action remanded with directions to enter judgment for the defendants.

CALUMET SERVICE COMPANY, Respondent, vs. CITY OF CHILTON, Appellant.

January 31—February 20, 1912.

TRIAL. (1–5) *Findings of fact.* PUBLIC UTILITIES. (6–11) *Purpose of law: Basic idea: Construction: Classification of privileges: Single control.* (12, 13) *What is a "public utility."* (14) *Service "directly or indirectly to or for the public."* (15–18) *Franchise: Indeterminate permit: Scope and limitations.* (19–21) *Capacity to acquire permit: Corporate power: Enlargement by implication: Exchange of existing franchises.* (22–27) *Exclusive rights: "Monopoly:" Right to serve city: Excusable interruptions of service: Power of city to establish competing plant: Conditions precedent: Certificate of public convenience and necessity.* (29, 30) *Equity: Injunction.* (28) *Assignability of property and privilege.*

Equitable action closed by findings in some 14,000 words. An assignable privilege was granted by a city to do public utility service therein for public and domestic purposes with usual incidental rights. The privilege was exclusive as to city service for a time and preferential thereafter and exclusive for a longer term as to domestic service. The business was established. The entirety was vested in plaintiff before commencement of the action. There were four corporation owners in the chain of title and questions as to some respecting corporate power,—particularly as to the second corporation which, in due form, acquired an indeterminate permit for the old privilege

under ch. 499, Laws of 1907. The exclusive city term had expired but service was continuing. Thereafter the city sought to enforce conditions of the old privilege; to invade the field claimed to be exclusive, incident to the permit; to establish a business to that end; and incur indebtedness therefor without complying with the public utility law, claiming rights under statutes antedating such law. The impeachment of plaintiff's claimed rights caused it pecuniary loss and prejudiced it in performance of its duties, and made further loss imminent. Except for disturbance thus caused, plaintiff and its predecessors were willing and competent, substantially all the time, to perform their public utility duties.

The decision involves these points:

1. Sec. 2863 of the Code should be reasonably followed below, in the circumstances stated therein, by a decision stating "separately all the facts found."

2. "Facts" means pleadable facts.

3. "Separately" refers to pleadable or pleaded facts, each being required to be covered by a finding confined thereto.

4. A decision under sec. 2863 of the Code should contain one finding for each actually, or in effect, pleaded fact, upon which the parties depend, phrased in concise, clear, judicial language, avoiding repetition, elaboration, discussion, and evidence or evidentiary facts or circumstances.

5. Compliance with the Code, as indicated, is to be striven for, to minimize unnecessary judicial labor, raise the grade of it, increase judicial efficiency, and promote economy and certainty in the administration of justice.

6. The sole purpose of ch. 499, Laws of 1907 (secs. 1797*m*—1 to 1797*m*—108, Stats.), was to promote general welfare by affording public utility service directly and indirectly to and for the public, of the highest practicable efficiency, at the lowest practicable rates under the circumstances of each particular case, having regard for existing proprietary interests and reasonable opportunity for municipal ownership on a basis of justice to existing proprietors.

7. Ambiguous parts, if there be any, of the public utility law, should be read in the most reasonably favorable light to effect the manifest purpose, comprehensive definitions of the law being adhered to regardless of technical meaning of terms.

8. The basic idea of the public utility law is stated in sec. 1797*m*—3, thus: "Every public utility is required to furnish reasonably adequate service and facilities," etc. "The charge . . . shall be reasonable and just, and every unjust or unreasonable charge . . . is prohibited and declared unlawful."

9. The duty and responsibility indicated in No. 8 applies to municipalities engaged in public utility business.

10. Those parts of the law, other than the one declaring the purpose, are auxiliary thereto,—a prescription of means for effecting the end aimed at.

11. The dominant means was classification of existing and prospective privileges to do public utility business, making the latter indeterminate and conditionally exclusive and inducing each owner of a former to join the latter as to the scope of the then existing privileges, by acquiring an indeterminate permit; thus gathering all into a single class referable directly to a single source for existence and to a single standard for a measure of rights, duties, responsibilities, and advantages, *i. e.* the public utility law, and a single control,—the railroad commission, subject to the conditions and limitations of such law.

12. For detail means, by sec. 1797*m*—1, the person or persons, natural or artificial, in touch with the public in connection with public utility service, whether as owner, operator, manager, or controller, or private or *quasi*-public entity, is a public utility, the physical and other things in use, public utility property, and the subject of the service,—a utility,—the term "public utility" being used to characterize the physical situation and condition as to immediate authority over it.

13. One, natural or artificial, public or private, municipal or otherwise, answering to the calls of sec. 1797*m*—1 of the Statutes, viewing the descriptive words in the broadest reasonable sense, and disregarding technical capacity to hold and enjoy *in præsenti*, was for regulation and control to effect the end sought, given the status indicated, subject to prescribed duties and responsibilities, with corresponding advantages, all subject to the single control under the single standard.

14. "Directly or indirectly to or for the public," includes service whether to a municipality or its inhabitants, or both, or by a municipality for itself or its inhabitants.

15. A privilege within the scope of No. 14, whether a license, permit, or, technically, a franchise, is the latter in the statutory sense.

16. An indeterminate permit is a perpetual exclusive privilege within the scope of the grant, subject to the code of conditions and limitations.

17. An indeterminate permit duly received for an old privilege is of the same scope as the latter as to the privilege feature, freed from all considerations, limitations, reservations, and control incidents prescribed by the municipality as a state agency, including the right of repeal, if any reserved, but subject to the conditions and limitations of the public utility law.

18. The law contemplates all relations created by a munici-

pality between it and the grantee of a franchise and inhering therein as being the mutual creation of the state, through its agent, and the grantee, and subject to termination by the same mutuality.

19. The essentials of "public utility" to acquire an indeterminate permit for an old privilege, are referable to sec. 1797*m*—1 of the Statutes; that of corporate status is satisfied by corporate existence *de jure* or *de facto*, referable to Wisconsin written law; that of existing privilege, by ownership of any right from the municipality, whether resting in grant, permit, license, or franchise in the technical sense, either being a statutory franchise; and that of operating under the privilege *in præsenti*, by services offered and affordable, and willingness and ability in that regard, except for reasonable and excusable cessations not involving any purpose to abandon.

20. Want of corporate power referable to defect in organization and not militating against existence *de facto*, or referable to limitations of corporate purpose specified in the organic articles, which under ordinary circumstances are only subject to be inquired into by the state, directly, does not affect capacity to acquire an indeterminate permit.

21. The general grant of power under the circumstances specified in sec. 1797*m*—77 of the Statutes, to acquire an indeterminate permit, by necessary implication was intended to enlarge, if necessary, corporate powers, enabling the organization to legitimately deal with the state in the exchange of equivalents,—to surrender its rights, whatever they may be, and take and enjoy the one offered in lieu thereof.

22. The privilege, conditional and temporary or otherwise, under a grant through municipal agency, to supply a municipality with a particular utility, using the public places to that end, in case of exchange thereof for the indeterminate permit of the statute, retains in the substituted franchise the privilege features, with the added element of perpetuity and the element of exclusiveness, freed from all prior conditions and limitations, but subject to those of the public utility law.

23. An indeterminate permit as in No. 22, within its scope, as to the municipality for its own service or service by it to its inhabitants, or service to others by any other public utility, is characterized by the elements of perpetuity and exclusiveness, mentioned.

24. The purpose of the law was to give the holder of an indeterminate permit, as in Nos. 22 and 23, as regards the conditions existing at the time of its origin, a qualified monopoly within the scope of the privilege, subject to the conditions and

limitations of the public utility law,—the term "monopoly" not being used in its common-law sense, except as to exclusiveness, but being characterized by purpose to promote public welfare, by a return consideration and by not being of common right, instead of being otherwise but for the grant and being for private gain.

25. Given a field, occupied under sec. 1797*m*—77 of the Statutes, for service to a municipality and its inhabitants, and the city will be incompetent to interfere except upon obtaining from the governing commission a certificate of public convenience and necessity, evidencing that reasonably efficient service at just and reasonable rates is not obtainable under the existing privilege, or by otherwise complying with the public utility law.

26. The statutory conditions which preceded the public utility law, empowering a municipality to construct or own public utility property for municipal or general use within the municipality and incur indebtedness therefor, were so superseded by such law as to render the latter paramount and the former subsidiary, making such statutory conditions usable only conditioned upon municipal compliance with such law.

27. Given a public utility corporation operating in a municipality under an indeterminate permit notwithstanding reasonable and excusable interruptions of service, and all proceedings of the city to construct a rival plant and do a rival business without first complying with the conditions of the public utility law, are void.

28. A public utility property and privilege constitute an entirety, partaking of the character of the privilege, and are of proprietary nature, and assignable the same as property commonly, in the absence of any express prohibition.

29. Given a situation of a public utility property operating under an indeterminate permit received in exchange for a prior privilege and the municipality, nevertheless, insisting upon conditions and limitations of the old grant, and proceeding accordingly, assuming to possess authority to do so, and invading the field reserved to the holder of the indeterminate permit without satisfying the conditions precedent in that regard, to the irreparable injury of the existing public utility,—and a situation exists for equitable interference and relief adequate to the case.

30. In the circumstances stated in No. 29, if the illegitimate claim of right extends to that of invading the reserved preferential right to do the municipal lighting, the equitable relief should quiet the right of the existing public utility against

such wrong claim, and afford injunctional prevention of its being acted upon.

[Syllabus by MARSHALL, J.]

31. Language used in the opinion in *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 417,—speaking of a privilege, such as was grantable to an individual as well as to a corporation, as a "corporate state franchise,"—corrected.

32. *Per* TIMLIN, J. The indeterminate permit obtained upon surrender of a pre-existing franchise is not necessarily a *perpetual* permit subject only to the conditions presently prescribed in the public utility law. That law is subject to repeal or amendment like other statutes.

APPEAL from a judgment of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Action for equitable relief. Its nature as disclosed by pleadings and evidence and embodied in the findings is thus summarized:

I.

Defendant city, December 7, 1897, granted an assignable franchise, license, or permit to one Bink, who accepted the same, to erect, maintain, and operate in such city an electric lighting plant to supply light, heat, and power for public and private use for fifteen years, using the city public places, as usual, to that end, with the sole right to do the public lighting therein for ten years and preferential consideration in that regard thereafter, and a right to franchise extensions in respect thereto, reserving the privilege to purchase the property in a manner specified, and right of repeal, in case of failure to furnish electricity as provided during thirty consecutive days, or of wilful violation of any requirement of the franchise or to properly carry on the contemplated business.

II.

Bink installed the plant and established the contemplated business, and thereafter, by him and his associates and successors in interest,—1st, Wisconsin Storage & Electric Company, 2d, Wisconsin Electric Service Company, 3d, Public Service Company, and 4th, plaintiff,—it was maintained and

all duties incident to said franchise, or the substitute therefor hereafter mentioned, down to the time of the trial, were fully performed,—except as prevented by defendant's wrongful conduct,—and the public lighting was paid for, except $396 for the last quarter of the ten-year period, ending December 14, 1907.

III.

Each of said companies was, and plaintiff is, a duly organized corporation under the laws of the state of Wisconsin; the first had due capacity to, and did, acquire as owner, the said franchise, the second, likewise, as owner, acquired it and the indeterminate permit duly granted by the state in lieu thereof, as hereinafter stated, which permit and all property in use and for use in connection therewith, including the public utility business privileged thereby, in due course, passed to the third corporation and subsequently to the fourth, each being duly authorized thereto, and was possessed by the latter with such indeterminate permit at the time of the commencement of this action.

IV.

During the second ownership, the company duly incumbered the franchise and property for $20,000, issuing bonds which are outstanding and were to defendant's knowledge, during the time material to this case.

V.

December 21, 1907, during the third ownership the company surrendered the Bink franchise under ch. 499, Laws of 1907, receiving from the state, in lieu thereof, a perpetual and exclusive privilege,—called an indeterminate permit,—to do the things privileged before, subject to the conditions and limitations of such chapter.

VI.

During the latter part of the ten-year period of the Bink franchise, the owner became financially weak and did not efficiently maintain the plant and give altogether satisfactory

service, though largely, or wholly, because of defendant's fault. The latter, ostensibly because of such poor service, refused to deal with such owner; whereupon the latter offered to comply fully with the franchise, or sell to the city, or meet any competition, but said city refused all advances in that regard and invoked the railroad commission, December 23, 1907, to grant a certificate of public convenience and necessity, authorizing another public utility in the city. The proceedings were dismissed because of the existing public utility and defendant's failure to proceed in reference thereto as contemplated by the public utility law.

VII.

Notwithstanding the refusal to deal with plaintiff's predecessor, under the public utility law or the old franchise, public and private lighting was continued till January 17, 1908, though payment for public service and recognition of there being any existing privilege in the matter were refused. Hostility by the city; its efforts to have the claimed privilege superseded; as indicated, or by proceedings by the attorney general, destroyed the then company's credit, caused its legitimate business to drop and forced it to temporarily suspend. However, it continued all reasonable endeavors to make some sort of arrangement with the city and failed in that regard.

VIII.

March 17, 1908, in the circumstances stated, the city council of defendant submitted the matter of building a lighting plant to the electors; resulting in 190 votes for and 92 against.

IX.

May 30th thereafter, such council voted to issue bonds for a plant; the intent throughout being to displace the old one both as to public and private lighting.

X.

Such action was under secs. 926—128 to 926—131, inclusive, of the Statutes, which did not warrant the same, but, if pursued, would inflict upon plaintiff irreparable loss in per-

manently destroying its business, lessening the value of its indeterminate permit, injuring its credit, and depreciating the security of its bonds, besides injuring it as a taxpayer of the city.

XI.

Such conduct created a cloud on plaintiff's public utility property and business, preventing it from efficiently performing its duties, causing it to lose old, and preventing it from acquiring new, patronage, and creating such prejudice among the people as to lead to actual injury to its street lights and other property.

XII.

Each owner in the chain of title to the existing franchise has been ready and willing to perform its public utility duties, and any failure is attributable to the wrongful conduct stated; furthermore, plaintiff is now able, willing, and competent to so perform; its property is in full operation, neither it nor its predecessors inexcusably suspended; it was organized in the interests of the bondholders whose money is invested in the property, and it incurred large expenses for the purpose of meeting all requirements as a public utility corporation and was encouraged thereto by defendant as hereafter stated.

XIII.

The first real default in said bonds was January 1, 1908. The bondholders learned of the suspension March 6th thereafter. Soon they were encouraged by the city authorities to believe that, if they obtained control, amicable relations with the public could be resumed. Thereupon they acquired such control, including the public privilege, vesting all in plaintiff, acting in the matter under competent legal advice for the best interests of all concerned, and expending considerable sums of new capital to create a basis for adjustment of all differences and fully perform the duties incident to the public privilege.

XIV.

Plaintiff's predecessor and the bondholders were notified that, August 8, 1908, the city council of defendant would act on an ordinance repealing the Bink franchise for specified violations. Before then such bondholders, to protect their interests and save the public utility property, caused plaintiff to be duly organized and to acquire the entire property with the indeterminate permit; including such rights as might exist under the Bink franchise, and the same was acquired accordingly; each of the preceding corporations conveying to it. Before said date the city was notified thereof and that plaintiff was able to and would, at once, enter upon full performance of its public utility duties, and that it was ready to enter into any fair arrangement with the city. Nevertheless, the city council adopted the repealing ordinance.

XV.

Jurisdiction as to repeal was superseded by the new permit; and, moreover, the city was estopped from exercising any right of repeal by its aforementioned conduct. Nevertheless, its action constitutes a cloud on plaintiff's public utility rights and property, damaging the value thereof, destroying or undermining its credit, and preventing it from acquiring the business status essential to existence and capacity for its public utility duties. Full publication of the ordinance would create such further cloud, in the whole, causing plaintiff irreparable loss.

XVI.

Plaintiff exercised due care to put such property in commission and perform the duties incident to its privilege. It fully resumed operations September 17, 1908, and has ever since complied with the law. It diligently commenced this action, securing an interim injunction to prevent the repealing ordinance from being effective, but was not able to use such injunction till August 21, 1908, at 5 o'clock p. m. Pub-

lication occurred under date of August 22, 1908, though papers were being printed at the time of service and some had been deposited in the postoffice.

From such situation as to facts the court concluded that plaintiff was a public utility corporation owning an indeterminate permit under ch. 499, Laws of 1907, entitling it to the exclusive privilege, subject to the conditions and limitations of such law, to maintain, add to, and operate an electric plant in the defendant city for the purpose of producing, transmitting, delivering, or furnishing heat, light, or power, either directly or indirectly, to or for the public in said city; that such privilege, till superseded in the manner provided in such law, was exclusive respecting city as well as other service; that all proceedings by defendant inconsistent therewith were void; and that plaintiff was entitled to judgment accordingly, including injunctional features appropriate to the case, and to recover costs.

Judgment was rendered accordingly, exceptions being saved raising the questions discussed in the opinion.

For the appellant there was a brief signed by *L. P. Fox*, city attorney, and *P. H. Martin* and *James Kirwan*, of counsel; a supplemental brief signed by *P. H. Martin*, of counsel; and oral argument by *Mr. Martin* and *Mr. Fox*.

For the respondent there was a brief by *Thompsons, Pinkerton & Jackson*, attorneys, and *J. E. McMullen*, of counsel, and oral argument by *W. D. Thompson* and *C. D. Jackson*.

Briefs were also filed upon the question of the validity of ch. 217, Laws of 1911, signed by *H. O. Fairchild* and by *Victor I. Minahan*, as *amici curiæ*.

MARSHALL, J. In the foregoing summary, covering a few pages, we have stated, it is thought, the essentials, from any viewpoint, of the fifty-four-page finding required to be examined in order to discover just what was decided in this case as a basis for the judgment. A recast of the findings

seemed necessary. It has been accomplished by elimination of over nine tenths of the words originally used. The vital matters could, by more study, be covered by still less. It would be a valuable change in administration, one tending to successfully meet some criticism of the law where it is free from fault, the trouble being with its administration, if more attention could be efficiently given to closing an equity case by concise findings of fact, covering singly and concisely the material pleaded, or pleadable, and proved or admitted grounds for redress or defense, avoiding repetition, elaboration, discussion, and all evidentiary matters even to mere evidentiary facts. Such is what the Code calls for. To such its letter and spirit restrict the findings. Why not conform thereto, especially since the labor, and the expense, both public and private, are thereby minimized and the case would be, as a rule, more easily understood, the initial judgment be more liable than otherwise to be securely grounded; in short, since there are many and very valuable advantages, both public and private, in the course suggested and no disadvantages. The court has spoken several times, quite emphatically, on this subject, and not without effect, though with less, as the case in hand and others which have come to this court indicate, than we had hoped for. This is said with more of desire to lighten the labor of the overworked trial judge than thought of criticising.

The overcaution which often results in such excessively long findings as we have had to deal with here, greatly adds to the necessary labor of trial courts and this court without corresponding benefits,—generally the opposite. Elimination of all which is unnecessary, so far as practicable, and concentration of energy upon essentials, will minimize work while raising the grade of it, and greatly add to efficiency of each unit in the field of trial administration. Without saying more we counsel attention to *Farmer v. St. Croix P. Co.* 117 Wis. 76, 93 N. W. 830; *McKenzie v. Haines,* 123 Wis.

557, 102 N. W. 33; *McDougald v. New Richmond R. M. Co.* 125 Wis. 121, 103 N. W. 244; *Fanning v. Murphy,* 126 Wis. 538, 105 N. W. 1056; *Neacy v. Milwaukee Co.* 144 Wis. 210, 222, 128 N. W. 1063.

The briefs of counsel for appellant cover a wide range of subjects. It includes many which, in the judgment here, are not sufficiently material to warrant special treatment. They are all interesting subjects for study. Each was exhaustively and technically treated by the eminent counsel. If the result of the case, from any viewpoint involving doubt, depended upon a discussion of them in detail the mere labor of it would not cause hesitation to meet the situation.

The case is one of great importance as regards the few vital questions. It is especially so as to the main contention,—the real key of the controversy between the parties. It is so important to the vast public interests involved in the public utility field, which the legislature evidently intended to encompass by ch. 499, Laws of 1907 (secs. 1797*m*—1 to 1797*m*—108),—and, so far, it has been found to have accomplished the task with such distinguished completeness that the enactment stands as a most consummate effort of legislative wisdom and a model for similar efforts elsewhere,—it is thought that any uncertainty left in the law by the previous judicial tests which have been applied to it, can best be eliminated by confining this opinion and discussion to the particular point, or points, of uncertainty which constitute the real root of this litigation, turning aside all mere technical questions and makeweights. Thus restricted the opinion is liable to be of unusual length.

Are those of the findings of fact which call into activity the questions of law upon which the legitimacy of the judgment complained of depends, sustained by the evidence? That is the first grand division of the subject to be dealt with. If there are other findings not material from the suggested viewpoint they may well, and will, be passed without special men-

tion. Thus brushing aside the inconsequential, we come first to the question of whether respondent's remote grantor, the Wisconsin Electric Company, acquired an indeterminate permit under the public utility law. The court so found as a fact, and the finding was duly excepted to. In a sense, it was a mixed matter of law and fact, but so far partook of the cast of the latter that it was properly pleadable as a fact and thus passed upon.

Subsidiary to the foregoing major proposition, is the question of whether the Electric Company, at the time of the surrender proceedings, December 21, 1907, satisfied the calls of sec. 1797*m*—1 of the public utility law for a "corporation . . . that . . . may own, operate, manage or control any plant or equipment or any part of a plant or equipment within the state, . . . for the production, transmission, delivery or furnishing of heat, light, . . . or power either directly or indirectly to or for the public," and at the same time satisfied the calls of sec. 1797*m*—77 of such law for a "public utility, being . . . a corporation duly organized under the laws of the state of Wisconsin, operating under an existing license, permit or franchise."

There is no question but that the Electric Company complied with all requirements of the surrender feature of the law found in the last mentioned section, or but that if, at the time of the surrender, it had the requisite status to satisfy the calls aforesaid, it received by operation of law, in consideration of that which it surrendered, an indeterminate permit of the character mentioned in the public utility act and offered to any corporation possessing such status in exchange for its existing privilege. So we turn to the question of competency.

It is useless to discuss at any great length, whether the Electric Company satisfied the full scope of sec. 1797*m*—1, since it is clear beyond room for fair controversy, that it responded thereto sufficiently. The comprehensive language, "own, operate, manage or control any plant or equipment or

any part of a plant or equipment within the state, . . . for the production, transmission, delivery or furnishing of heat, light, . . . or power either directly or indirectly to or for the public," was plainly designed to cover every conceivable situation of the existence of an industry of the nature mentioned. No room was left for controversies over technical ownership or capacity to own. The purpose was to encompass the physical situation,—to deal with the condition whatever it might be, and the person, natural or artificial, whatever might be the particular relation of the person, or persons, natural or artificial, to the physical situation or condition, whether that of owner, operator, manager or controller, and give thereto the status of a public utility. The Electric Company obviously was located somewhere within this broad field. Therefore, it was a public utility,—one essential to capacity to acquire an indeterminate permit under sec. 1797*m*—77.

Now regardless of the exact scope of the corporate powers of the Electric Company it clearly was a duly organized corporation under the laws of this state and so had the second essential to acquire the permit. While there seems to be no efficient ground for impeaching the original scope of the organization, a point perhaps not essential to this case, there is no ground which can be urged collaterally, and none that could be by defendant in any event, since there is no question but that it was at least a corporation *de facto*. Moreover, the city, both in its own behalf and as a state agency, recognized and dealt with it as a corporation for much over a year after the company took over the property from its predecessor. In proceedings before the railroad commission the city insisted by sworn petition that the company was a duly organized domestic corporation; that it became owner of the Bink franchise; that it had duly surrendered the same; and that the city had refused to deal with it under the public utility law for reasons suggested. 2 Railroad Comm. Rep. 326.

Notwithstanding the foregoing, which we only refer to as an additional ground for the essential of efficient corporate status, the case might well be rested in respect to the matter upon what seems from the record quite plain, *i. e.* that there was no infirmity in the corporate organization or capacity in any event. But if it were otherwise as to the original scope of the corporate authority, the company possessed ample power because, by force of the public utility law, the corporate authority was automatically expanded, if necessary, to enable the company to receive the thing given to it for the one surrendered,—the one which it was operating under, regardless of any technical question as to its previous capacity, at the suit of the state, to so operate. No opportunity was left at this point for cavil or complication. If the corporation was operating, within the meaning of the law, under the privilege surrendered, and had a right, as against any other claimant, to make the surrender, that gave it corporate capacity to do so. The law, in holding out the consideration for the surrender and inviting acceptance thereof, by necessary implication afforded the company capacity to deal with the state in such invited exchange of equivalents. The paramount essential was that the company making the surrender should be a domestic corporation,—one referable to Wisconsin law for its existence and powers, thus possessing a status enabling the state to shape such powers, if necessary, so as to meet the necessities of the contemplated traffic in privileges,—a corporation amenable to Wisconsin jurisdiction to the fullest extent essential to enable the administrative commission to readily prevent abuse of the privilege granted and compel full performance of the duties incident to the grant.

Whether the Electric Company had a franchise, in the strict technical sense, granted by the city of *Chilton* to do public utility business therein, though we perceive no good reason why not, independently of any statutory definition, is of little moment. The legislature anticipated room for controversies over such matters and, *ex industria,* guarded against it. In

that respect the most consummate care was used in framing the law. The legislature did not rest the matter, as it might have done, by mere use of the term "franchise." The broad term was used instead, "license, permit or franchise,"—in short, any public privilege of any sort to do any kind of the service mentioned within the scope of the public utility law, followed by the term "franchise" as a synonym for the entirety. The company had the privilege granted to Bink. That is clear. The appellant confessed it in the proceedings before the commission, as we have seen. It was a privilege of some sort to do public utility business in the city of *Chilton,* covered by the broad phrasing repeatedly therein used, "license, permit or franchise," and in the more concise phrasing in sec. 1797*m*—77, referring to the broader one as an entirety for an antecedent "franchise." Here again note the legislative care to guard against prejudicial controversies over the subject dealt with. Observe that it was a situation and a condition in the entirety which the lawmaking power had in view. Plainly the purpose was not to leave any room for claiming that any part thereof was omitted by grounding the claim on technicality as to the meaning of words. In the popular, if not legal conception, and why not the latter is not perceived, a privilege to do anything, not a matter of common right but referable either directly or indirectly to sovereignty as the grantor, is a franchise. The legislature evidently had this conception in mind, yet thought it was synonymous with the legal meaning, but to remove all doubt used the words, as indicated, "license, permit or franchise," and "franchise," interchangeably. So the Electric Company had the third essential to competency to acquire an indeterminate permit.

Was the company, operating under its existing "license, permit or franchise" within the meaning of sec. 1797*m*—77? There seems to be no question about that. At the date of the surrender proceedings, December 21, 1907, the company was furnishing electric current, both to and for the public for all

purposes. It continued to thus furnish till January 17, 1908, and till the defendant refused to deal with it under any circumstances, or to recognize it as having any rights under the public utility law, thus creating a condition rendering temporary suspension necessary to prevent loss, and excusable as the trial court decided. We will say, in passing, that the words "operating under," etc., in sec. 1797*m*—77, were doubtless used in the same sense as the words "in operation under" in sec. 1797*m*—74 which we shall speak of later. Enough has been said, at this point, to show that the Electric Company had the particular feature here discussed of capacity to surrender its existing permit and obtain a new one in lieu thereof.

So the findings are amply sustained that the Electric Company December 21, 1907, acquired an indeterminate permit. The surrender proceedings in form and substance were without infirmity; the company had all the essentials of capacity to make the exchange,—(a) It was a public utility; (b) It was a duly organized corporation under the laws of this state; (c) It had a "license, permit or franchise" to do public utility business in the city of *Chilton;* and (d) It was operating under such "license, permit or franchise."

The next subsidiary question is: What was the scope of the privilege? That is plainly ruled by the letter of the public utility law as analyzed in *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co.* 145 Wis. 337, 129 N. W. 600, and *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530. It was a privilege emanating directly from the state to do the things theretofore privileged by it through the city as a state agency, freed from all conditions or limitations except those of the public utility law. This field was explored so fully in the *La Crosse Case* that the better way now, as it seems, is to refer thereto respecting matters therein settled instead of indulging in any lengthy rediscussion thereof.

No question is raised but that the Bink franchise privileged

the grantee to generate and convey electric current and distribute it in the city of *Chilton* to supply the city and its inhabitants with light, heat, and power, and to use the public places of the city and do the things usual to that end. By the terms of the privilege, it contemplated a means of supplying electric current directly to the public by dealing with its inhabitants in their individual capacities, all possessing the common right to be served, and to the city,—the inhabitants thereof in their corporate capacity. That contemplated not only supplying, as indicated, but having a supply or capacity to supply from, to satisfy all needs within the corporate limits of the municipality. The privilege, as to the corporation, was no less significant than as to the inhabitants, except as regards the ten-year limitation of exclusiveness. As to the mere preferential element in serving the city in the public utility field, there was no difference.

The Wisconsin Electric Company then was clothed with an indeterminate permit of the full scope mentioned. It manifestly included the privilege to do all things contemplated by the terms "supply to the city or its inhabitants" found in the original grant. That it included supply to the city by the grantee utilizing the current to do the municipal lighting is evident, because such particular use was specified and, as we have seen, made exclusive for a term of years and preferential thereafter, in the Bink franchise.

Thus the principal proposition stated at the outset must be answered in the affirmative. The Wisconsin Electric Service Company, as found, on the 21st day of December, 1907, became the owner of a "license, permit or franchise," call it what we may, from the state, characterized in the public utility law as an indeterminate permit, of the scope, as regards the privilege feature, of the Bink franchise, as herein determined. The physical things in use and for use in connection therewith, and the existing business to which the privilege was referable, all became, by operation of law, merged in the

single thing, the public utility property. The franchise, in such circumstances, is the principal thing and, in general, is inseparable from the rest. The latter really partakes of the nature of the former. *Washburn v. Washburn W. Co.* 120 Wis. 575, 98 N. W. 539; *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 619, 108 N. W. 557. The entire thing is to be considered apart from the franchise to be a corporation which is inherently unassignable, and apart from such property franchises as are unassignable by their terms. The entire privilege element here was susceptible of ownership as property, subject to the conditions and limitations of the public utility law, and so assignable to any purchaser competent to take thereunder,—a corporation duly organized under the laws of this state, sec. 1797*m*—75, Stats. (Laws of 1907, ch. 499).

The corporation which took title from the Wisconsin Electric Service Company seems to have satisfied all the requisites mentioned. If as a purchaser from the grantee of the state the public utility law cannot be referred to as expanding its corporate capacity if necessary to fit the situation, as in case of the original grantee, and so its capacity must be found in its articles, they seem to be sufficient. They specify the "manufacture, sale and distribution of . . . electric currents" for all purposes. That would seem to leave no infirmity in corporate power, since incidental to the broad general purpose there must exist the ordinary and reasonable means of effecting it. But in any event, the mere want of power could not be challenged collaterally. *John V. Farwell Co. v. Wolf,* 96 Wis. 10, 70 N. W. 289, 71 N. W. 883; *Eastman v. Parkinson,* 133 Wis. 375, 113 N. W. 649; *Security Nat. Bank v. St. Croix P. Co.* 117 Wis. 211, 94 N. W. 74.

Further, the third corporation was not much more than a mere conduit through which the property, by due conveyance, passed to and was vested in the fourth corporation, the respondent, which was organized for the particular purpose of

acquiring it and performing the public duties incident to its ownership. It expressly purposed, among others, this: to "manufacture, distribute and sell electricity . . . for any and all purposes . . . to acquire the franchise rights, privileges, contracts, real estate and electric lighting plant at *Chilton,* Wisconsin, for the purpose of reorganization, improvement and operation, and to enjoy all the powers conferred by law upon domestic public-service corporations."

So, still laying aside for the present the effect of the attempted repeal of the Bink franchise, the findings that plaintiff was competent to acquire and own the indeterminate permit aforesaid, and did so August 18, 1908, and continued to be such owner and to actually operate the property and perform its public utility duties from that time down to the time of trial, barring some interferences mentioned in the findings, which need not be more than incidentally referred to, seem to be supported beyond room for successful challenge. That the corporation was organized in good faith by those whose money was invested in the property, as found, does not appear to be assailable.

The next basic question is this: What were the conditions and limitations of the rights incident to the indeterminate permit? We have heretofore dealt mainly, with the privilege feature, finding that it includes supplying the city of *Chilton* as well as its inhabitants with electric current for heat, light, or power, in short, all purposes, and maintaining and operating a plant with all essential or convenient accessories to that end. But the mere privilege feature is one thing, while the conditions and limitations is another.

The trial court covered the subject of conditions and limitations of the indeterminate permit as matter of fact, and permissibly so. It is of mixed law and fact, partaking more of the latter than the former.

The findings are to the effect that only the privilege feature of the old franchise, survived the surrender for its equivalent;

emanating directly from the state; that all the conditions and limitations of the old one and all contract features between the city and the owners of the privilege inherent in the grant, were extinguished by the surrender and superseded by the "conditions and limitations" of the public utility law. Is that finding correct?

The stated proposition is ruled in the affirmative by the letter and spirit of the public utility law and by the previous decisions of this court. *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co.* 145 Wis. 337, 129 N. W. 600; *Manitowoc v. Manitowoc & N. T. Co.* 145 Wis. 13, 129 N. W. 925; *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530. After the full discussion of the subject in the last case cited, it does not seem best to go over the matter again, at least, more than briefly or incidentally.

The court there called attention to the significant language of sec. 1797*m*—77, "shall . . . receive by operation of law in lieu thereof, an indeterminate permit . . . and such public utility shall hold such permit under all the terms, conditions and limitations of this act." That negatives, as was said, "any idea that the legislature contemplated the so-called indeterminate permit would be subject to any conditions or limitations of the surrendered grant; that any limitation or condition was in legislative contemplation, except those 'of this act' independently of the scope of the mere privilege feature and appropriate police regulations. The idea was the exchange of a privilege held upon specified conditions and limitations mentioned therein or attached thereto for a new one of equal dignity" as to the privilege feature, "subject only to the conditions and limitations of this act." The court, further, after quoting sec. 1797*m*—77, said:

"Does not that language tell, without judicial aid, its own plain story, contemplating as to old franchises, in their entireties, a complete severance of all relations between sovereign authority,—whether exercised directly or through mu-

nicipal agencies,—and the owners of the franchises, by an optional exchange of old ones for new ones, equivalent as to the privilege element, denominated indeterminate permits? There is no suggestion in the statutes of coercion, no hint of a purpose to take away from franchise owners anything other than by their consent; exchanging in each case a privilege with new incidents for an old one with its incidents; a complete change from an existing to a new condition." . . .

"*Ex industria* the legislature said, 'the filing of such declaration shall be deemed a waiver by such public utility of the right to insist upon fulfilment of any contract theretofore entered into relating to any charge or service regulated by this act.' All such matters were henceforth to be referable to the public utility law under the supervision of the state commission. Such statute was made unmistakably exclusive as to everything affecting the service, its character, and charges therefor to consumers, whether public or private. The extinguishment of the obligatory features of the old franchise as to one side by necessary inference operated to extinguish such features as to the other. Such must have been the legislative purpose. . . . The thing existing after consummation of an exchange upon which respondent's business was dependable, was the new privilege, emanating directly from the state, denominated an 'indeterminate permit;' a permit to do the things theretofore licensed by the state through the municipality as a state agency, but now unconditionally, except as specified in the public utility law."

So it follows that the fifteen-year limitation of the Bink franchise, the condition in respect to the repeal of the privilege, and all other conditions and limitations mentioned therein, ceased to exist on the 21st day of December, 1907. The most significant thing at this point is the extinguishment of the repeal feature.

What are the conditions and limitations of the new privilege found in the public utility law? Everything of that nature, inherent in the old grant, or which, as between the state, acting through the city, and the grantee of the old privilege, formed part of the consideration for the grant, were by the same mutuality which originated them, extinguished,

in consideration of the incidents of the substituted privilege,—the conditions and limitations of the public utility law.

What are the substituted conditions and limitations mentioned? They are various. The determination of this case does not require reference to all of them. There are several features designed to give to the municipality adequate protection. One of primary importance is the right of the municipality to take over the property by purchase upon "terms and conditions determined by the commission." Sec. 1797*m*—78. The public utility charges are required to be "reasonable and just." Sec. 1797*m*—3. The municipality as a consumer, as well as representative of its inhabitants, is made competent to challenge before the commission the reasonableness or justness of any of the rates, tolls, charges, or schedules, or anything affecting efficient performance of the public utility duties. Full power in this field is given the commission for efficient regulation, in harmony with the requirement that the service shall be efficient and charges reasonable. Sec. 1797*m*—43 and associate sections. Ample power as regards police regulation is reserved to the municipality. Sec. 1797*m*—87. Subject to the special right reserved to the city, not having to do with rules and charges for service, the whole field is placed under the supervision of the commission with power to enforce the dominant purpose of the grant to render it as certain as practicable that all public utility service rendered "either directly or indirectly to or for the public" shall be reasonable as to character, and reasonable and just as to charges.

In consideration of submitting to full control by the commission and the right of the municipality, at its option, to take over the property as indicated, certain conditions and limitations in favor of the grantee are attached to the new privilege. The dominant feature thereof is that the franchise shall not only be perpetual, subject to the conditions

and limitations of the law,—indeterminate as it is said,—but shall be subject to such conditions exclusively. In other words, the idea is that the grantee, under state control, and subject to prescribed limitations and supervision, shall have a "monopoly," as it has been several times called by the railroad commission, in its administrative work, and by this court, within the field covered by the privilege, as to rendering the particular public utility service, whether directly or indirectly, to or for the public.

We should say, in passing, that the term "monopoly" as thus used is to be taken in the sense of a mere exclusive privilege granted for a consideration equivalent; monopoly only in the sense that the field of activity is reserved to the grantee,—the mere element of exclusiveness. A privilege of that sort, where there is a consideration equivalent to the public, though often spoken of as a "monopoly" is essentially different from one of the character regarded as odious at common law and prohibited in many state constitutions; a privilege from the sovereign to the individual as a mere favor to the latter for his aggrandizement, or as such and the personal advantage of the individual sovereign grantor, the thing granted being by way of limitation, of what would otherwise be of common right, to the particular grantee. The term "monopoly" as it has been used to characterize the privilege in question, has been sanctioned in many jurisdictions, they sometimes differentiating it from "monopoly," in the offensive sense, and sometimes not, it being assumed, from the very nature of the case, that the word would be taken in its popular and common, rather than in its technical sense. In this line to justify, or rather explain the use of the term by the commission and the court, reference may be had to the following illustrations: *State v. Milwaukee G. L. Co.* 29 Wis. 454; *Davenport G. & E. Co. v. Davenport,* 124 Iowa, 22, 98 N. W. 892; *Ludington W. S. Co. v. Ludington,* 119 Mich. 480, 78 N. W. 558; *Bartholomew v. Austin,* 85 Fed. 359; *Charles*

River Bridge v. Warren Bridge, 11 Pet. 420, 607; *New Orleans G. Co. v. Louisiana L. Co.* 115 U. S. 650, 6 Sup. Ct. 252; *International T. C. Co. v. Hanks D. Asso.* 111 Fed. 916. In the latter case it is said that the word "monopoly" as now commonly used, and used in the patent law, is not a monopoly at all in the ancient sense. According to the logic of Judge STORY in the *Charles River Bridge Case,* to be such the privilege must not only be made exclusive by sovereign authority but be something theretofore of common right.

So while, in common parlance, it is proper to characterize the exclusive privilege in question, a monopoly, it is one purchased by giving an equivalent to the public, as in case of a patent allowed by the federal government. It is a grant for a public, not for a private purpose, and not a grant of that which without it would be of common right. It has none of the essentials of the monopoly so offensive, anciently, in the eye of the law.

While perhaps the term "exclusive privilege" is the better term to apply to the right in question, the word "monopoly" has been used in the books with reference to such franchises. The use of it seemed proper and in the particular matter it has been a handy word. It was doubtless more suggestive than the term "exclusive privilege," as regards the general conception by the administrative commission of the real purpose of the law, and that here, in regard to a matter supposed to be pretty clear though not yet specifically passed upon, and now before us for the first time for that purpose.

A few general observations at this point, in regard to the ground gone over, and passing remarks respecting matters which were immaterial at the start, or have been rendered so by the conclusions already reached, and we will return to the subject of whether the exclusive privilege in question excludes the city of *Chilton* from going into the electric lighting business, even to the extent of doing its own lighting, except under the conditions and limitations of the public utility

law; that is either by taking over the existing plant owned by respondent, or demonstrating to the commission, in due proceedings to that end, that public convenience and necessity require it, notwithstanding the existing public utility. To establish the negative of that proposition is doubtless the main purpose of this litigation.

Notwithstanding the care,—the comprehensiveness at all points of the public utility law, and the manifest purpose of it to remedy all the mischiefs of the old situation, prominent among them being the contests between owners of existing public utilities and others, including the municipality, striving to acquire the field, or some part of it, often to the great prejudice of all concerned, and manifest injustice to innocent investors, and notwithstanding the general trend of administration of the law by the commission, stopping just short of a definite stand on the particular point, and notwithstanding the plain logic of the decisions of this court, stopping short, it is true, of an adjudication of the particular matter,—it has remained, as we have suggested, so far, a mooted question as to whether the exclusive privilege of the public utility law acts prohibitorily upon the municipality as well as others desiring to invade the field of exclusiveness, as regards serving the public in the aggregate,—that is doing the municipal lighting, as well as serving patrons in general in their individual capacities.

To recur to the suggested general remarks before closing upon the final point,—as we have seen, respondent possessed an indeterminate permit at the time this action was commenced. As to electric service, it covered the whole field intended by the public utility law to be reserved to the holder of such a permit. We shall not spend time discussing the circumstances of the temporary suspension of service under the privilege. The privilege still existed. It could only be superseded or annulled by some proceeding under the law, directly to that end, so long as there was no abandonment.

None was taken. The city, instead of submitting to the statute and proceeding thereunder, proceeded in defiance of it. In good faith we may well conclude, through misconception of its rights, but in defiance, nevertheless. After acquitting it of any bad intent, the fact still remains that its action was utterly void in attempting to repeal the franchise which had, in legal effect, been merged into the new franchise and so passed beyond municipal authority to disturb it. It follows, necessarily, that defendant had no power to build a municipal plant for encroachment upon respondent's exclusive field, which, manifestly, from the findings well supported, was the purpose, even laying aside for the moment the subject of municipal lighting. Having no such authority, clearly, it had no authority to issue bonds to pay for carrying out its *ultra vires* purpose.

So regardless of whether defendant complied with the forms of law in respect to building a municipal lighting plant and issuing bonds therefor, or either, the statutes to which its actions are referable, from any viewpoint, were rendered inoperative by the public utility law, except upon compliance by the city with the conditions and limitations therein, including the specified conditions precedent to capacity to build a municipal lighting plant such as it proposed to build. That it did not do, and did not propose to do, rendering respondent helpless as regards protecting its privilege, investment, business, and field therefor, guaranteed by the public utility law, other than by commencing this action. That the attitude of appellant and its acts committed and threatened, cast a serious cloud on respondent's property rights and privileges and was destructive thereof, rendering irreparable loss imminent, as found, and that it was remediless to successfully and adequately meet the mischief except by an appeal to the jurisdiction of equity, in the judgment of this court, is well supported in the record. That gave respondent ample capacity to sue as it did.

Thus the findings which are material to some substantial relief embodied in the judgment, covering as they do some mixed matters of law and fact, are approved. As there are no further questions of fact, or of that nature, which may well be referred to, we turn to the scope of relief granted, as the second major division of the subject presented.

It is insisted that the judgment went too far by, in terms or effect, enjoining appellant from proceeding to build and operate a plant of its own for the purpose of municipal lighting, except conditioned upon a successful appeal under the public utility law for permission to invade the field claimed by respondent to be reserved to it subject to the conditions and limitations of such law.

This particular phase of the judgment counsel insist is legitimate, because it amounts, as said, to no more than a judicial declaration of the law, not dependable upon the form of the decree. That is the final, and we repeat, probably the dominant matter of controversy in the litigation.

Stating the proposition concisely: Does the public utility law, in the circumstances of this case, afford to the operator, under an indeterminate permit, preferential right to do the municipal as well as the private lighting, so that the municipality can no more invade the field itself than it can by a rival company, or the latter independently, all being in that respect subject to the judgment of the commission as to whether public convenience and necessity require the disturbance because efficient, adequate service at reasonable and just rates therefor is not obtainable under the existing franchise?

As before suggested, in terms or effect, during discussion of the findings of fact complained of, it would seem that the affirmative of this last question, basic and dominant as it is, follows inevitably from the logic, if not the letter, of *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530. It was there held that, the evident intention of the legislature, expressed in unambiguous language, when read in the

light of the situation dealt with, was, by treaty with the owner of existing franchises, to displace the old situation, in its entirety, with all its complications, the growth of years, and we may add, with all its bitter controversies, the like of which is pictured in this case, and to substitute a new situation, all looking to unity, in practical effect, of a multitude of diverse units corresponding to the many outstanding franchises, and others in prospect, harmonizing by making them referable to a single standard, to wit, the public utility law, and to an ultimate single control, to wit, control by the trained impartial state commission, so as to effect the one supreme purpose, *i. e.* "the best service practicable at reasonable cost to consumers in all cases and as near a uniform rate for service as varying circumstances and conditions would permit; a condition as near the ideal probably as could be attained." Certainly, that great object might well have aroused legislative ambition to a high plane, and inspired legislative wisdom accordingly, as it did in fact. Completeness of the law, so far as tested, and its success under the efficient conservative administration of it by the commission, bear witness to that. As, in effect, suggested in the *La Crosse Case,* the evident purpose of the law to produce the ideal condition indicated, and the means designed to that end, are so plain, and, we may add, so legitimate from all constitutional viewpoints heretofore suggested, or reasonably apprehended, and from all viewpoints of public and private economy and sound public policy, that, if to leave the door open where there is an existing privilege covering the field, as in this case, to municipal invasions to any extent, would greatly disturb the harmony of the system the legislature purposed constructing, and prevent the full accomplishment of the end sought to be attained, judicial construction, if that were necessary to determine the meaning of the law, should rather lean toward preventing such result.

In the further treatment, appreciating the somewhat repe-

titious character of it, but deeming that justifiable to bring out the final result with as much clearness as practicable, we will refer to some significant features of the statute.

We must keep in mind, as suggested in the *La Crosse Case,* that the state was competent to take to itself all authority as regards the scope of the privilege,—regardless of anything inhering in or connected with the old one,—by consent of the owners of the latter, cannot be doubted. The municipalities acted wholly as state agencies. As principal, it was competent for the state to make new arrangements with its grantees in place of the old ones.

We must further keep prominent the supreme purpose before stated: service as efficient as practicable at as low rates as just and practicable under the circumstances of each particular situation. That is shown in the premise portion of the act. The first section (sec. 1797*m*—1) deals with definition of terms, giving to each such comprehensiveness as not to leave any fair ground for claiming that any part of the situation to be dealt with was overlooked, either in the details of the plan, or the means of effecting it.

Treating of the new privilege, it was given a name so comprehensive as to include, without room for doubt, as before indicated, every sort of an existing privilege in the public utility field to serve the public. Note the significance of the term "either directly or indirectly to or for the public." In this, we repeat, nothing is left out, service to the public in the aggregate as well as in individual capacities, was unmistakably included.

The next section (sec. 1797*m*—2) deals with administration, giving the commission the broadest of legitimate powers in that regard so as to enable it to supply all details of administrative work. Note the language: "The railroad commission of Wisconsin is vested with power and jurisdiction to supervise and regulate every public utility in this state and to do all things necessary and convenient in the exercise of

such power and jurisdiction." There is administrative authority to the limit, including *quasi*-legislative as well as *quasi*-judicial power.

The next section deals with the great object of the act. "Every public utility is required to furnish reasonably adequate service and facilities. The charge made by any public utility . . . shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited and declared unlawful." Around the objective feature, all the balance of the provisions of the act are grouped, existing public utilities being necessarily placed in one group, and prospective public utilities in another, each for the necessary special treatment, to bring all under the single system and single control to effect the single purpose of promoting the public good without injustice to any one.

That one of the principal mischiefs sought to be remedied by the new system, was elimination of the conditions promotive of hostilities between municipalities and public utility companies, after making large investments by permission and invitation to serve the public directly as well as indirectly,—bitter controversies, sometimes for good reasons and sometimes not, but in any event at the expense of consumers of the product,—seems quite certain.

It likewise seems certain that one of the major means for attaining the desired end was elimination of excessive investments, and excessive expenses caused by two or more public utilities, each with its separate property and fixed charges, where the need of the consumers only required one, and elimination of risk to investors by encroachments, or threatened encroachments, upon an occupied field of public service without any public necessity therefor. Doubtless an unvarying and invariable economic law was squarely faced and appreciated, that all such subjects for elimination represent waste, which if not avoided would, in the main, fall on the product, increasing the cost of service per unit and be paid by the con-

sumers. It was the interests of consumers which was the prime subject of legislative solicitude; such object to be conserved without injustice to others.

In the situation pictured it could not have escaped legislative consideration, and, necessarily, would not have been considerately left unguarded against, that in the cities and villages of the state, in general, public utility service at the lowest practicable rates with the highest practicable efficiency, is impossible without combining the municipal service with that to others.

Further, it could not well have escaped appreciation and been left unguarded against, that one of the fruitful sources of waste to ultimately fall, largely if not wholly, on consumers, and fruitful sources of wasteful controversies and injustice to owners of existing investments, many of whom were bondholders as in this case, was opportunity for municipalities to unreasonably menace existing investments by threatening to displace, or actually displacing, in whole or in part, existing public utilities in cases where proper regulation would secure efficient operation; ample efficient service in the whole field, thus creating waste in many ways and to a large amount in the aggregate, to the impairment of efficiency, in general, and enhancement in cost, per unit of service to the customer, contrary to the purpose of the act.

In the light of the foregoing, strongly indicating that the legislature must have intended that the new privilege, where the old one occupied the whole field, in that it was granted to provide for service to the public directly as well as indirectly, and there was no other public utility at the time of the surrender of the old franchise, should be exclusive, let us turn further to the letter of the law.

Sec. 1797*m*—79 provides four distinct methods by which a municipality may become the owner of a public utility plant and conduct public utility business: 1st. By constructing a plant; 2d. By purchasing an existing plant by agreement;

3d. By condemnation of an existing plant whether operating under a public privilege or not; 4th. By purchase of an existing plant through the commission as provided in the act. In each case the power is granted "subject to the provisions of this act." Such provisions, in all cases of the existence of a privately owned plant, operated as in this case, require a permit from the commission upon a showing of public necessity and convenience. In that there is an unmistakable prohibition by implication. But plainer still is sec. 1797*m*—74:

"No municipality shall hereafter construct any such plant or equipment where there is in operation under an indeterminate permit as provided in this act, in such municipality a public utility engaged in similar service, without first securing from the commission a declaration, after a public hearing of all parties interested, that public convenience and necessity require such municipal public utility."

The words "similar service" plainly relate to the words in preceding sections, "either directly or indirectly to or for the public;" the words "public utility" relate as distinctly, to a municipality performing the service, whether "directly or indirectly to or for the public," as to a private corporation, and the words "operating under an existing permit" do not suggest, necessarily, in continuous operation,—absence of momentary or reasonable cessation. Excusable, temporary suspensions, involving no purpose to abandon, the owner being willing and seasonably, under the circumstances, able to resume and doing so, as in this case, satisfies the calls for a "public utility operating under," etc.

The law must be given a reasonable,—sensible,—construction, at all points, to the end that the legislative intent shall not fail, instead of looking with favor upon technical assaults upon it.

In this connection it should be remembered that in the proceedings before the railroad commission to displace respondent defendant grounded its claim on ownership by the Electric

Company, a domestic corporation, of the indeterminate permit, but that the company was not operating thereunder, and the petition was denied upon substantially the same grounds upon which respondent prevailed in this case,—particularly that it possessed an indeterminate permit and was excusable for the delinquencies claimed to have occurred. Thus there was an adjudication, to all intents and purposes, of the precise point, as it seems, which we now have in hand, so far as the commission had jurisdiction.

The conclusion which must result from the foregoing is that the relief granted respondent is not excessive. The field of exclusiveness of the privilege, in the circumstances of this case, includes municipalities, whether desiring to invade the forbidden territory for municipal lighting only, or for other or all purposes.

Thus the care with which the public utility law was framed as regards harmony of parts, and completeness and efficiency of details to accomplish the single purpose of promoting the highest attainable good of customers without injustice to existing vested interests, or prejudicial interference with competency for municipal ownership on a fair basis, is again vindicated. With the wisdom of the law we have nothing to do except as that may aid in understanding it. However, we may well say, that, in so far as the matter has come before this court, has been vindicated by the wise, efficient administration of it by the commission.

In closing, we again confess that much discussed by counsel has not been mentioned at least specifically. There was no need of it. No question, however, has been passed over without testing it carefully for materiality. With much care to eliminate all inconsequentials, the discussion has been so extended as to make the opinion quite long, and necessarily so, because of the endeavor to respond fully to the effort of counsel to secure treatment of the vital points in all reasonable aspects. The facts being determined, and we must say, in

passing, as to pure matters of fact, there was little or no room in the evidence for serious controversy, the result turned wholly on the terms of the statute in which we find little or no ambiguity. So, necessarily, the great range of treatment by counsel, supported by numerous authorities, was largely outside the real case in hand. No part of that, it is thought, has escaped attention.

By the Court.—The judgment is affirmed.

The following opinion was filed February 23, 1912:

TIMLIN, J. I concur in the decision of the court and in much that is said in the opinion of Mr. Justice MARSHALL. In so doing I understand the court does not attempt to decide that by the surrender of the pre-existing franchise and the acceptance of an indeterminate permit an irrepealable contract is created between the municipality and the public-service company. It is said in the opinion: "The dominant feature thereof is that the franchise shall not only be perpetual, subject to the conditions and limitations of the law—indeterminate as it is said,—but shall be subject to such conditions exclusively." If this is meant to say or suggest that "indeterminate" means "perpetual," subject only to the conditions presently existing in the statute, I do not agree with it. Indeterminate does not mean perpetual; it means "not determinate; indefinite; not distinct or precise as to limits, character, or meaning; vague; as, indeterminate symptoms; an indeterminate series; indeterminate feelings or ideas; not fixed or known beforehand; not predetermined as to date, place, or the like; as, an indeterminate appointment; not leading to a definite end or result; as, an indeterminate debate. In criminal law a sentence which fixes the period or amount of punishment only within certain limits, leaving the exact term or amount of punishment to be determined by the executive authorities, usually a board of managers." This is the definition given in Webster's New International Dic-

tionary. See, also, sec. 4971, Stats. (1898). I consider the public utility law subject to repeal or amendment like other statutes, and I feel sure the legislature had no intention of making it otherwise. This case does not call for the decision of any such question, but I fear the opinion may be misunderstood.

The following opinion was filed March 4, 1912:

MARSHALL, J. Since this case was concluded, I have discovered a mistake in the opinion I wrote for the court in *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 130 N. W. 530. I take the whole responsibility for it and confess there is little, if any, excuse for the inadvertence. I take this occasion for correcting the error so far as I can.

On page 417 of the opinion, speaking of a privilege, such as was grantable to an individual as well as to a corporation, this language was used: "The entirety was a state grant and so under legislative control like any other *corporate state franchise.*" The idea the language might naturally convey was not in mind. Of course such a privilege might be the franchise or property of a corporation, but not a corporate franchise. The two things are radically different. It is incomprehensible, that I could have thus confused the two in view of the former confusion which found place in the books after the correct doctrine was declared in *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, 560, which difficulty was removed in *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441, 83 N. W. 697, followed by *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851, and *In re Southern Wis. P. Co.* 140 Wis. 245, 122 N. W. 801,—the initial corrective case having been written by me. As said, in terms or effect, in all, it is only a franchise by act of incorporation, or a corporate charter, or a privilege inhering therein as a part of the organic act which is a corporate franchise, and so within

sec. 31, art. IV, of the constitution prohibiting the granting of corporate powers or privileges by special act and within sec. 1, art. XI, as to legislative power to grant corporate charters, but reserving the right to repeal, alter, or amend. To be within such, the franchise must be "essentially corporate," using the language of the chief justice in the *Linden L. Co. Case* quoted from that of Chief Justice RYAN in *Att'y Gen. v. Railroad Cos.*, "That is, as we understand it, franchise by act of incorporation." The mere governmental privilege, not corporate, is a thing of proprietary nature, which, as indicated in *In re Southern Wis. P. Co., supra,* may be granted to a corporation as well as to an individual, or to the latter and be sold to the former, or, in general, pass from owner to owner like any other property.

The logic of the foregoing is most distinctly stated as matter of elementary law in the *Water Power Cases, ante,* p. 124, 134 N. W. 330, where the court declared grants of such franchises, without reservation, not subject to recall.

It would be most unfortunate if after all the labor in *La Crosse v. La Crosse G. & E. Co., supra,* and here, to make the meaning of the public utility law unmistakable and give significance to the condition of stability the legislature purposed creating thereby, the old confusion were revived through my passing remark in the former case, or if the clarity hoped for from the two cases were disturbed by the thought that a mere legislative privilege of proprietary nature to do one thing is different from such a privilege to do a different thing, as regards whether a corporate franchise or not. What power of change exists as to a privilege granted under the public utility law because of its being subject to the conditions and limitations thereof, is another thing, as has been iterated and reiterated over and over again.

MCGRATH CONSTRUCTION COMPANY, Respondent, vs. WAUPACA-GREEN BAY RAILWAY COMPANY, Appellant.

January 31—February 20, 1912.

(1, 2) *Pleading: Liberal construction.* (2–6) *Railroads: Construction: Extra work: Conditions precedent to allowance of claims: Waiver: Substantial performance: Liens on railroad property.*

1. Upon a demurrer *ore tenus* the allegations of a complaint should be liberally construed.
2. In an action to recover for extra work under a contract for construction of a railroad, the complaint, alleging that plaintiff, pursuant to the terms of the contract, completed all of the work, and that estimates and certificates certifying full compliance with the contract were furnished the defendant by its engineer from time to time as the work progressed, is *held* sufficient upon a demurrer *ore tenus*, without further allegations of waiver of conditions precedent as to written orders and presentation of bills for extras at the end of each month.
3. Although the contract for the construction of a railroad provided that claims for extra work should not be allowed unless such work was done pursuant to a written order from the engineer in charge, yet where, for eight months prior to the performance of the extra work in question, plaintiff performed other extra work upon the oral order of the engineer, and the claims therefor were approved by him and paid by defendant with knowledge of the irregularity and without objection, the requirement of a written order will be held to have been waived as to the work in question.
4. So, also, although the contract provided that claims for extra work should be presented at the end of each month, a refusal of the engineer to receive claims for partial performance of certain extra work because the value thereof could not be computed until the completion of the road, justified a postponement of the presentation of the claims beyond the time specified.
5. Where itemized statements of plaintiff's claim for extra work were approved by the engineer upon certain conditions, and plaintiff thereafter fully performed such conditions except as to two small items, the amount of which was deducted from the claim, and the engineer certified that the work of construction had been completed pursuant to the contract and that he accepted and approved the work, these facts warranted a finding that plaintiff had substantially performed the contract and was entitled to recover on the claim for extras.

6. Sec. 3314, Stats. (1898), gives to those who perform labor or furnish materials in the construction of a railroad a lien therefor upon the railroad company's interest in the structures and the land upon which the improvement is situated, including its right of way, although used by the company in the operation of the railroad. Any suggestion in *Pittsburg T. Laboratory v. Milwaukee E. R. & L. Co.* 110 Wis. 633, in conflict herewith, is disapproved.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

On March 4, 1907, the plaintiff corporation and the defendant, a domestic railroad corporation, entered into a contract whereby the plaintiff undertook to construct for the defendant a railroad from Waupaca to Scandinavia. The work was completed on January 24, 1908. The specifications for the work provided for clearing the right of way, constructing the roadbed, including excavating and grading, erecting bridges, etc., laying the ties and rails, and ballasting and surfacing the track. Any changes or modifications were to be as directed by the chief engineer. The contract specifically provides:

"No claim for extra work shall be allowed unless such work shall have been done pursuant to a written order from the engineer in charge, and such claim shall have been made at the first estimate after such extra work was executed."

"It is also mutually agreed that when any work under this agreement for which no price is specified therein, shall be done by the contractor at the request of the chief engineer, then the contractor shall be entitled to a price to be fixed and determined by said chief engineer."

"The railway company is to pay the contractor eighty (80) per cent. of the amount of work done each month, according to the engineer's estimate, payment for same to be made on or before the tenth day of the month next succeeding.

"As soon as practicable after the first day of each and every month, and from and after the commencement of the work herein by the contractor, the said chief engineer shall furnish to the railway company a certificate and estimate of the ap-

proximate amount and value of the various kinds of work done and material delivered in the work or on the railway company's grounds, from the commencement of the work up to the said first day of the month; and on or about the tenth day of the month next succeeding the railway company will pay to the contractor the total amount of said estimate less the amount theretofore paid to the contractor, on account of any previous estimate, less twenty (20) per cent. of said estimate, which last named percentage or sum the railway company shall retain until the full and final completion of the work contemplated to be done under this contract, in strict accordance with the terms thereof; and when the entire work hereinabove agreed by the contractor to be done shall have been entirely finished and completed to the satisfaction and acceptance of the said chief engineer, and he shall have furnished the railway company a certificate to that effect, and shall with said certificate also present his estimate of the amount and value of the various kinds of work done by the contractor under the terms of this agreement, which estimate shall be final and conclusive between the parties hereto, then the railway company will pay the sum or sums, if any, shown by said final estimate to be due to him under the terms of this agreement, together with the twenty (20) per cent. above referred to, and any and all percentages by it retained as aforesaid, and such payment shall be in full settlement for all work done by the contractor under the terms of this agreement."

The agreement provided that the track supplies and the ties should be delivered to the plaintiff by the defendant on flat cars. The evidence shows that part of these supplies and ties were delivered to the plaintiff by the defendant in box cars and part in gondola cars.

In January, 1908, after the work was concluded, the plaintiff filed with the chief engineer two statements for force or extra work, one a demand based on extra work in ballasting and filling low points on the road, and the other for extra work made necessary because the supplies and ties were partly delivered in box and gondola cars and for transporting some

of this material from Scandinavia to Amherst Junction at the chief engineer's direction. These two items are substantially all that is involved in the issues tried in the present case.

After the plaintiff's proposal that the differences between the parties should be submitted to arbitration as provided in the agreement had been rejected, the plaintiff filed its claim for a lien upon the railroad and its right of way, including the depot grounds of the defendant.

The referee to whom the matter was referred found in effect that the extras charged in these two claims had not been performed by the plaintiff pursuant to a written order from the engineer, but that the work had been done upon his verbal order; that other extras for which the plaintiff had been paid had not been furnished upon written orders, but that they had been furnished at the chief engineer's verbal direction; and that payment therefor had been made on monthly accounts upon the engineer's approval. The two bills for extras here presented were not presented at the end of the months when furnished, but were held back until the completion of the work to which they pertained upon the engineer's suggestion, and were then approved upon condition that the plaintiff perform and finish certain small items of work embraced in the agreement. These were afterwards performed by the plaintiff with the exception of some burning of brush and some bolting, which the referee found had not been done because of defendant's failure to furnish the bolts and because the engineer had ordered that the burning of brush be stopped. The referee reduced the amount claimed by the plaintiff by the amount of these two items by allowing the defendant the cost of performing the work not performed by the plaintiff, and reported on this basis in favor of the plaintiff. The report of the referee was approved by the court and judgment was entered in accordance therewith. This is an appeal from the judgment.

For the appellant there was a brief by *E. L. & E. E. Browne & Lloyd D. Smith,* and oral argument by *Mr. E. E. Browne* and *Mr. Smith.*

For the respondent there was a brief signed by *P. H. Martin,* of counsel, and *Merrill & Silverwood,* attorneys, and oral argument by *Mr. Martin* and *Mr. T. P. Silverwood.*

SIEBECKER, J. The argument is made that the court erred in holding the complaint sufficient upon defendant's demurrer *ore tenus.* The claim is made that it was fatally defective in omitting to allege any waiver of the conditions precedent as to written orders and as to the presentation of bills for extras at the end of each month, as required by the contract. Upon such a demurrer the allegations of the complaint must be liberally construed. It is alleged that the plaintiff, pursuant to the terms of the contract, completed all of the work, and that estimates and certificates, certifying full compliance with the contract, were furnished the defendant by its engineer from time to time as the work progressed. These allegations sufficiently embraced the claim of a detailed compliance with the conditions of the contract with respect to these claims, and hence the court did not err in overruling such demurrer.

As heretofore stated, the controversy under the pleadings in this case relates to the items embraced in the claims for furnishing extra ballasting, and for extra labor and expenses incurred in handling ties and other material furnished by the defendant in box and gondola cars instead of on flat cars as contemplated by the contract. It is claimed that no recovery can be had for this material and the labor and expenses for the reasons that the chief engineer gave no written orders therefor, that the plaintiff omitted to present his claim therefor within the time prescribed by the contract, that the engineer filed no estimate and approval thereof with the defend-

ant, and that the evidence fails to establish what is due as the reasonable value thereof.

It is contended that the omission to obtain written orders for these extras from the engineer bars plaintiff's alleged right to recover for them. The referee found and the evidence shows that during each of the eight months prior to January, 1908, other extra work was performed by the plaintiff upon the verbal order of the engineer, that the plaintiff presented statements therefor to the engineer at the end of each month, that he approved them, and that the defendant with knowledge of these facts paid for such extras without making any objection on account of the omission of a written order for them. The plaintiff's representatives, in reliance on this practice and the waiver of the requirement by the defendant, proceeded to furnish these extras.

As to the omission to present the claims at the end of the month when furnished, it appears that these controverted claims covered and included material and labor furnished and performed in the three months immediately preceding the month of January, 1908, when the estimates therefor were presented to the defendant's engineer for approval. It is found, and the evidence supports the conclusion, that the statements and estimates for these extras were furnished as soon as practicable and as soon as the defendant's engineer would receive them. The evidence is to the effect that Mr. McGrath, who had control and was in actual charge of the construction work under this contract, was directed by the defendant's engineer not to present these claims until the work had been completed, because he was not enabled to pass on the items thereof until the work of constructing the road had been completed. It also appears that the engineer's course in so handling these claims was justified, because it appears that he was unable to ascertain the amount of the extra ballast, and the cost of doing the extra work in handling the

ties and other materials and the loss of time by the track crew on account thereof could not be ascertained until he had a statement of the full amount of ballasting furnished for the road and had obtained information from persons engaged in the handling of material and ties as to the time consumed in performing the labor. The evidence is sufficient to support the court's findings on these points and they cannot be disturbed on this appeal.

It is alleged in defendant's answer that after January 24, 1908, "the plaintiff duly requested defendant by its engineer and board of directors to accept said work under the terms of said contract," and that it refused to do so because the contract had not been completed according to its terms and conditions. It was found by the referee that the defendant's engineer had theretofore received itemized statements of the plaintiff's claim for these extras, had approved the same upon certain conditions, had delivered the same to the defendant's officers with this indorsement, and that the plaintiff thereafter and before February 12, 1908, had fully performed all of the conditions thereof except two small items which were completed by the defendant at a cost of $58. This was deducted by the referee from the plaintiff's claim. It also appears that the defendant's engineer did issue a certificate on January 27, 1908, certifying that the work of construction by the plaintiff had been completed pursuant to the contract and that he accepted and approved the work. These facts furnish ample ground to sustain the conclusion of the referee and the court that the plaintiff had substantially completed its contract and that it was entitled to recover upon its claims for extras. The approval of the various claims for extras for each of the eight months prior to January, 1908, without a written order therefor from the engineer in charge, justified the inference that the defendant waived this condition of the written contract; and the fact that defendant's engineer could not give an estimate on the items allowed in the two claims

here involved until the work was completed and refused to receive a claim for part performance thereof justified postponing a presentation of the claims beyond the end of each month during the period within which such work was actually done and the material furnished.

The contention that the referee's finding to the effect that the engineer approved these claims for extras is against the clear preponderance of the evidence is not sustained. The evidence of the engineer is clear that the work was necessary, that he directed that it be done, and that he finally approved the items and amounts as embraced in the statements presented to him. This is corroborated by other evidence in the case. Under these circumstances we cannot reverse the court for thus approving the referee's finding.

We are persuaded that the amount allowed the plaintiff as extras and the amount deducted from the claim for two unimportant items of unfinished work and the amount of the defendant's payments on plaintiff's orders are correct, and that other counterclaims were properly disallowed.

It is contended that the court erred in awarding plaintiff a lien on the defendant's right of way and its buildings and lands used in the operation of a railroad, upon the ground that the statutes giving laborers and materialmen a lien for doing work and labor and furnishing material do not include a right to a lien upon the right of way, the buildings, and the lands used by a railroad company in the operation of its railroad. This claim is based upon the remarks in the opinion in *Pittsburg T. Laboratory v. Milwaukee E. R. & L. Co.* 110 Wis. 633, 86 N. W. 592, concerning the prior cases of *Carney v. La C. & M. R. Co.* 15 Wis. 503, and *Purtell v. Chicago F. & B. Co.* 74 Wis. 132, 42 N. W. 265. In the last of the foregoing cases it was held that the legislature had the constitutional power to enact laws for the enforcement of liens of materialmen and laborers upon the bridges and other structures of a railroad company and the public policy of the state

was to enforce such a lien, and that "the company operates its railway and uses its franchises subject to the obligation to pay the claim of the lienor as established by the judgment." It was there decided that this policy had been recognized theretofore by the adjudications of this court, therein referred to; and upon consideration they were adhered to and approved. In the *Pittsburg Case* (110 Wis. 633, 86 N. W. 592) the decision was that a subcontractor was entitled to such a lien upon a power house of a street railway company, which was carrying out its purposes "by means of its plant and appliances 'other than the new power house' in question." In the discussion of the lien statute it was there suggested, in quoting from Elliott's work on Railroads (§ 1066), that "the courts will not presume that the legislature intended to subject the public to the annoyances and inconveniences which would necessarily attend the enforcement of a mechanic's lien against a railroad under a general mechanic's lien law, and will not so construe it, unless such an interpretation is clearly required." The *Pittsburg Case* did not reverse the holding of the prior decisions of this court, that the lien law enacted by the legislature gave the right of lien to materialmen and laborers upon the property of railroad companies and that such a company "operates its railroad and uses its franchises subject to such obligation to pay the claim of the lienor." The provisions of sec. 3314, Stats. (1898), that when such a lien is asserted for constructing a "continuous roadbed, structure or plant designed or intended for use as, or as part of, a single thing," and that whenever the work shall be done on more than an acre in a city or village or on more than forty acres outside thereof, the right of the lien claimant shall not be limited to such an acre or forty acres, but shall extend "to the whole of said continuous roadbed, structure or plant and the whole . . . land on which the same is constructed or which is intended to be used or is used for the purpose of such roadbed, structure or plant; and the

claimant may make and file a single petition or claim for a lien on all the same," and file it in each county in which such roadbed, structure or plant is situated, in whole or in part, and, in case of foreclosure of such lien, the roadbed, structure, or plant "shall be sold as one continuous and single thing," are pertinent and persuasive that the legislature intended to grant a right of lien to materialmen and laborers on the roadbed, structures, or plant of a railroad company and its interest in the land used by it in the operation of its railroad as one continuous and single thing; and we must so hold. Any suggestion in the *Pittsburg Case* in conflict herewith is disapproved as not a correct construction of the statute creating such liens.

We are of the opinion and determine that the letter and spirit of the statute show a legislative intent to furnish protection to those who contribute their labor and material to the building of a railroad, by granting them a lien therefor on its interest in the structures and the land upon which the improvement is situated, including its right of way, though it is used by the railroad company in the operation of its railroad.

We find no reversible error in the record.

By the Court.—Judgment affirmed.

MCGRATH CONSTRUCTION COMPANY, Respondent, vs. WAUPACA-GREEN BAY RAILWAY COMPANY, Appellant.

January 31—February 20, 1912.

(1, 2) *Pleading: Liberal construction.* (2–6) *Railroads: Construction: Extra work: Conditions precedent to allowance of claims: Waiver: Substantial performance: Liens on railroad property.*

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3. Although the contract for the construction of a railroad provided that claims for extra work should not be allowed unless such work was done pursuant to a written order from the engineer in charge, yet where, for eight months prior to the performance of the extra work in question, plaintiff performed other extra work upon the oral order of the engineer, and the claims therefor were approved by him and paid by defendant with knowledge of the irregularity and without objection, the requirement of a written order will be held to have been waived as to the work in question.
4. So, also, although the contract provided that claims for extra work should be presented at the end of each month, a refusal of the engineer to receive claims for partial performance of certain extra work because the value thereof could not be computed until the completion of the road, justified a postponement of the presentation of the claims beyond the time specified.
5. Where itemized statements of plaintiff's claim for extra work were approved by the engineer upon certain conditions, and plaintiff thereafter fully performed such conditions except as to two small items, the amount of which was deducted from the claim, and the engineer certified that the work of construction had been completed pursuant to the contract and that he accepted and approved the work, these facts warranted a finding that plaintiff had substantially performed the contract and was entitled to recover on the claim for extras.

6. Sec. 3314, Stats. (1898), gives to those who perform labor or furnish materials in the construction of a railroad a lien therefor upon the railroad company's interest in the structures and the land upon which the improvement is situated, including its right of way, although used by the company in the operation of the railroad. Any suggestion in *Pittsburg T. Laboratory v. Milwaukee E. R. & L. Co.* 110 Wis. 633, in conflict herewith, is disapproved.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

On March 4, 1907, the plaintiff corporation and the defendant, a domestic railroad corporation, entered into a contract whereby the plaintiff undertook to construct for the defendant a railroad from Waupaca to Scandinavia. The work was completed on January 24, 1908. The specifications for the work provided for clearing the right of way, constructing the roadbed, including excavating and grading, erecting bridges, etc., laying the ties and rails, and ballasting and surfacing the track. Any changes or modifications were to be as directed by the chief engineer. The contract specifically provides:

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"The railway company is to pay the contractor eighty (80) per cent. of the amount of work done each month, according to the engineer's estimate, payment for same to be made on or before the tenth day of the month next succeeding.

"As soon as practicable after the first day of each and every month, and from and after the commencement of the work herein by the contractor, the said chief engineer shall furnish to the railway company a certificate and estimate of the ap-

one and one-third years, when *Fred Ziegenhagen* married, after which time Marie Ziegenhagen and daughter Minnie went to live with him; that immediately after the death of said William his widow went to live with her son *Fred,* with whom she continued to live; that in the spring of 1900 William Ziegenhagen brought suit against *Fred Ziegenhagen* and Marie Ziegenhagen with reference to their property matters; that no complaint was ever served and the matter was settled out of court, by which settlement *Fred* agreed to pay his father the sum of $500 for the crops that were raised on his farm during 1895 and also $150 a year, to be paid semi-annually, in lieu of furnishing him food as mentioned in the contract for life support; that *Fred Ziegenhagen* failed and refused to pay the first semi-annual payment of $75 when it became due and also failed and refused to pay the $500 according to his agreement for the first year's crops, and suit was brought by said William against *Fred* in circuit court in 1901 to enforce payment of the same; that said action was duly tried September 7, 1901, and said Marie Ziegenhagen appeared at the trial to render what assistance she might to her son to defeat her husband's claim; that judgment was rendered in said action in favor of William Ziegenhagen for the full amount of his claim, which was paid; that said William Ziegenhagen gave his daughter, *Augusta Wendt,* about $30 worth of furniture at different times, and after settlement of said action with his son in 1900 gave her $1,000 in money, which is all the property he ever gave her; that the value of the real estate owned by said William Ziegenhagen, deceased, at the time of his death was $3,000 and the value of the personal property was $2,400; that said deceased, at the law office of Connell & Hart in the city of Waupaca, on the 9th day of June, 1900, duly signed and executed in writing and published in presence of two witnesses, Samuel A. Connell and John C. Hart, his last will and testament, and said witnesses at said time and place in presence of said tes-

tator and at his request and in the presence of each other duly subscribed said will as attesting witnesses; that said will in substance was as follows:

"Last Will and Testament of William Ziegenhagen.

"I, William Ziegenhagen, of the village of Weyauwega, Waupaca county, Wisconsin, being of sound mind and memory, do make, publish, and declare this my last will and testament, hereby revoking all former wills, bequests, and devises by me made:

"After payment of my just debts and funeral expenses I give, devise, and bequeath to my wife, Marie Ziegenhagen, the share of my property which the law allows her.

"I give and bequeath to my son, *Fred Ziegenhagen,* one dollar.

"I give and bequeath to my daughter, Minnie Ziegenhagen, the sum of one thousand dollars providing she is alive at the time of my death. In case she does not survive me the same shall go to my daughter, *Augusta Wendt.*

"I give, devise, and bequeath to my daughter, *Augusta Wendt,* all the remainder and residue of my estate of whatever name, title, and description, real, personal, or mixed, and hereby appoint her executrix of this will.

"In witness whereof I have hereunto set my hand and seal this 9th day of June, 1900.

"WILLIAM ZIEGENHAGEN. (Seal.)"

That due execution of said will and the provisions thereof were clearly and satisfactorily proven by Samuel A. Connell and John C. Hart and *Augusta Wendt,* witnesses on the trial of this action; that at the time of writing, signing, witnessing, and executing said instrument bearing date on or about the 9th of June, 1900, said William Ziegenhagen was of full age and also of sound mind, and before and since the making of said will had always been through his whole life to time of last sickness of sound mind; that said testator left said will in the office of Connell & Hart until sometime in 1905 or 1906, when he took the same into his own possession and carried it away with him; that said William Ziegenhagen was the cus-

todian of the will of one Follendorf, a neighbor, and kept said Follendorf's will, together with his own private papers, locked in a drawer in a closet in his residence; that Marie Ziegenhagen, his wife, would occasionally get the key and unlock the drawer containing said valuable papers and look the same over; that said William Ziegenhagen had a stroke of paralysis several days prior to his death, and remained in a paralyzed condition until he died; that immediately after he suffered said stroke of paralysis said Marie Ziegenhagen took from him the key to said drawer and took therefrom all of his valuable papers and put them in her bosom; that she permitted said William Ziegenhagen to sit in a chair in his paralyzed condition for two days before calling in any help for him; that said Marie Ziegenhagen had taken the part of her son, *Fred Ziegenhagen,* as against her husband on different occasions and was disposed to aid said son and was always on very friendly terms with said son; that *Fred Ziegenhagen,* when notified of his father's illness, although he lived only a short distance from his sister, *Augusta Wendt,* did not send her any word of her father's serious illness; that he went at once to his father's house in the village of Weyauwega and was there with his mother several hours before the arrival of said *Augusta Wendt;* that said William Ziegenhagen recognized the existence of his will down to a short time before his death; that said William Ziegenhagen did not, prior to his death, destroy or cause to be destroyed said will with the intention of revoking it; that said will was never revoked or canceled by said testator, but that Marie Ziegenhagen and *Fred Ziegenhagen,* or one of them, did, at some time prior or subsequent to the death of said William Ziegenhagen, destroy or suppress said will, or cause the same to be done, without the knowledge or consent of said William Ziegenhagen, and that said will cannot be found, though diligent search and inquiry have been made.

And as conclusions of law the court found that Exhibit "I"

which is fully set out in the testimony, bearing date June 9, 1900, and propounded as such as the last will and testament of said William Ziegenhagen, deceased, should be established and admitted to probate as and be adjudged to be the last will and testament of said deceased, and that letters testamentary thereon be directed to issue to *Augusta Wendt,* named therein as executrix thereof, upon her complying with all requirements of law in that behalf provided; that the judgment of the county court refusing to admit said instrument to probate as the last will and testament of William Ziegenhagen, deceased, should be reversed; that said matter, together with the records and files relating thereto, should be remanded and transmitted to the county court of Waupaca county, with directions to said court to proceed in said matter in the manner provided by law; that the proponent, *Augusta Wendt,* should have full costs against the estate.

Judgment was entered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Byron B. Park* and *C. F. Crane,* and oral argument by *Mr. Crane.*

For the respondent there was a brief by *John C. Hart* and *S. A. Connell,* and oral argument by *Mr. Hart.*

KERWIN, J. The contention of the appellant for reversal is that the evidence is not sufficient to overcome the presumption of destruction of the will by deceased *animo revocandi.* The questions covering this contention were submitted to the jury and answered in favor of the respondent. The verdict of the jury was approved by the court and further findings made, which appear in the statement of facts. The proceeding to probate the will in question is based upon sec. 3791, Stats. (1898), which provides for the establishment of a lost or destroyed will. Counsel for appellant rely upon the proposition of law that when a will cannot be found, after the death of the testator, there arises a presumption that it has

been destroyed for the purpose of revoking it. But this presumption may be overcome by evidence, the burden being upon the proponent. *In re Valentine's Will,* 93 Wis. 45, 67 N. W. 12; *Gavitt v. Moulton,* 119 Wis. 35, 96 N. W. 395. Sec. 2290, Stats. (1898), provides that no will shall be revoked unless by burning, tearing, canceling, or obliterating with the intention of revoking it, by the testator or by some person in his presence and by his direction, or by some other will or codicil in writing. The undisputed evidence shows that William Ziegenhagen duly executed his will June 9, 1900, and died January 21, 1909, and that after his death his will could not be found. There is no serious dispute as to the contents of the will. So we come to the only question in the case, namely, whether the presumption of revocation has been overcome. The verdict of the jury and the findings of the court below are so full and explicit that no further statement of facts is necessary. We therefore approach the question whether the evidence is sufficient to overcome the presumption of revocation and support the findings. The only reason which can be perceived for destroying the will with intent to revoke it, upon the established facts, is the purpose to give *Fred,* son of William Ziegenhagen, deceased, upwards of $2,000 more than he had received before his father's death. As shown by the evidence and the findings, *Fred* had been given the bulk of his father's property before execution of the will. It also appears from the finding that after the transfer of the property to *Fred* his father commenced two lawsuits against him. The first was settled and the other went to judgment, and the amount of said judgment was paid by *Fred.* It is also established that the only property which *Augusta Wendt* received during the lifetime of her father, William Ziegenhagen, was $1,000 in money and $30 worth of furniture, and that the value of the real estate owned by deceased at the time of his death was $3,000 and the personal property $2,400. The relations of the parties,

therefore, and all the facts established by the record support the idea that no reason existed at any time after the execution of the will for changing it so as to give *Fred* any portion of his father's property other than that received by him before the execution of the will. Moreover, the evidence appearing in the record is ample to support the findings that deceased did not revoke his will. The evidence clearly shows that the deceased, many times after the execution of the will, recognized its existence, and not only manifested no disposition to change it, but affirmatively asserted that he did not wish to change it,—that it was all right and should so remain. The will remained with his attorneys for about six years after its execution and until about three or four years before the death of said Ziegenhagen, at which time he took it from his attorneys' office, stating that he had no intention of changing or destroying it or making a new one. It also appears that after deceased transferred to his son *Fred* the farm of 180 acres together with the personal property mentioned in the findings, he left the farm, and his wife, Marie Ziegenhagen, remained with *Fred* until he married, when she again went to live with her husband. The evidence shows that *Augusta Wendt* was at all times on the most friendly terms with her father and performed services for him at various times, and that he often stated that she was to have his property after his death. In a conversation which deceased had with one Glock a year or two before his death Glock stated that he had had lots of trouble with his wills, and told deceased that he would have to look out that he made his right, and deceased replied, "Mine is all right made," and asked Glock whether it would be necessary to record it. Several other statements are related in the evidence in which deceased said that his daughter, *Augusta Wendt,* was to have his property after his death, and that *Fred* had already received enough. In one conversation during the last years of his life when his wife, who apparently from the record was partial to *Fred,* spoke to

him about changing his will, deceased said that he would not make his will over. The evidence also shows that during the last year of his life, when *Augusta Wendt's* daughters were helping deceased clean house, papering, and painting, he said to them that he could not pay them, but that the property was their mother's and that they would have it some day. He also made similar statements with reference to improvements and repairs being made by them upon the property. But, without further recital of the evidence, it is sufficient to say that it is ample to support the verdict of the jury and the findings of the court below to the effect that the deceased did not destroy his will with intent to revoke it. *Adams v. Rodman,* 102 Wis. 456, 78 N. W. 588, 759; *Ewing v. McIntyre,* 141 Mich. 506, 104 N. W. 787; *Aikin v. Weckerly,* 19 Mich. 482; *Bauskett v. Keitt,* 22 S. C. 187; *Schultz v. Schultz,* 35 N. Y. 653; Rood, Wills, § 357 and cases cited.

Where the will was kept, after having been removed from the office of the attorney who drew it, does not appear. There is evidence that Mrs. Ziegenhagen did not know the terms of the will, but believed a will had been drawn by her husband, and stated in a conversation with her granddaughter that she thought the law was wrong that allowed a man to make a will and not let his wife know about it. The court found that deceased kept his papers locked in a drawer in a closet, and the evidence shows that sometimes the key to the box was carried by him and sometimes was left in the pocket of his clothes hanging in the wardrobe. It seems that during his last illness he had the key in his pocket on his person and that Mrs. Ziegenhagen took it, and that she and her son *Fred* had ample opportunity to get possession of the will if it was in the locked box. Deceased had a paralytic stroke and remained with his wife about two days before any one was notified, and died shortly thereafter.

It is claimed by respondent that during this last illness Mrs. Ziegenhagen, after obtaining the key, removed and se-

creted the will, or destroyed it, or that she and her son *Fred* did so. The court and the jury found that Mrs. Ziegenhagen and her son *Fred,* or either of them, either prior or subsequent to the death of William Ziegenhagen, destroyed or suppressed the will, or caused the same to be done, without the knowledge or consent of deceased. It is contended on the part of the appellant that the evidence is not sufficient to support the finding to the effect that the will had been destroyed by *Fred* and Mrs. Ziegenhagen, or either of them, because the law requires more than a preponderance of evidence upon such an issue. We do not think it necessary to consider or decide this question. The findings are ample and well supported by the evidence to fully overcome the presumption that deceased destroyed his will with intent to revoke it. That is sufficient for this case. It follows that the judgment must be affirmed.

By the Court.—The judgment is affirmed.

HARVEY, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

February 1—February 20, 1912.

Summons: Signature.

Omission of the signature from the copy of summons served upon defendant, where the annexed papers, served therewith, advise the defendant of the name and address of the plaintiff's attorney, is a mere irregularity and not a jurisdictional defect.

APPEAL from an order of the circuit court for Buffalo county: E. W. HELMS, Circuit Judge. *Affirmed.*

An unsigned summons in this action was served on a station agent of the defendant on September 26, 1910. Attached thereto was a copy of the complaint, which was signed

by the plaintiff's attorney, and on the cover or backing of the summons and complaint were indorsed the title of the action, the words "summons and complaint," and also the following: "S. G. Gilman, Plaintiff's Attorney, Mondovi, Wis." The original summons was duly signed, but was not filed until October 24, 1910. Defendant did not appear or answer, and judgment was taken against it by default on October 27, 1910. On November 10th, following, defendant appeared specially and moved to vacate the judgment and set aside the service of the summons, "for the sole reason that no summons" had ever been served in the action. The circuit judge denied the motion, and from the order denying the same defendant appeals.

The cause was submitted for the appellant on the brief of *William G. Wheeler*, attorney, and *Edward M. Smart*, of counsel, and for the respondent on that of *S. G. Gilman*.

BARNES, J. Defendant had the right to assume that the copy of the summons served was what it purported to be, a true copy of the original, and, if an unsigned summons is in fact no summons at all, then the court acquired no jurisdiction of the person of the defendant and the service should have been set aside. If the signature is not necessarily an essential part of the summons, then we have a mere irregularity to deal with and not a jurisdictional defect, and the trial court reached a correct conclusion. The precise question here involved was before the Minnesota and Iowa courts and they reached opposite conclusions, the Minnesota court holding that the omission of the signature was a mere irregularity (*Lee v. Clark*, 53 Minn. 315, 55 N. W. 127), and the Iowa court holding that an unsigned summons was no summons and could give the court no jurisdiction of the person of the defendant (*Hoitt v. Skinner*, 99 Iowa, 360, 68 N. W. 788). This court has said that the only object of the statute (sec. 2630, Stats. 1898) in requiring the summons to show

the name and address of the attorney or party who commences the action "is that the defendant may know upon whom and at what place he may serve his answer and other papers in the action." *Mezchen v. More,* 54 Wis. 214, 216, 11 N. W. 534. Under the authority of this case we must hold that the omission of the signature was a mere irregularity and not a jurisdictional defect. The papers annexed to the summons and served therewith advised the defendant of the name and address of the plaintiff's attorney and supplied the omission complained of by giving defendant the requisite notice of the name and address of the person upon whom to serve such papers as it desired to serve in the action.

By the Court.—Order affirmed.

O'MALLEY and others, Respondents, vs. MILLER and wife, Appellants.

February 1—February 20, 1912.

Vendor and purchaser of land: Specific performance: Parties: Wife refusing to join in deed: Dower: Deduction from price: Pleading: Demurrer: Tender.

1. Although the wife of the owner of land was not a party to a contract for the sale thereof she is a proper party defendant to an action by the vendee for specific performance, because, having an inchoate right of dower, her interest is adverse to the plaintiff within the meaning of sec. 2603, Stats. (1898).
2. The vendee in such a case is entitled, if the wife refuses to join in a deed to him, to retain from the purchase price a sum equal to the value of the contingent dower interest; and the wife ought to have her day in court on the question of such value.
3. A proper party defendant cannot successfully demur to the complaint on the ground that he is not a necessary party.
4. Tender of the purchase price of land *held* to be sufficiently pleaded.

APPEAL from an order of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Affirmed.*

The cause was submitted for the appellants on the brief of *Jesse S. Field,* and for the respondents on that of *White & Skogmo.*

VINJE, J. This is an action for the specific performance of a contract for the sale of land, and for damages in case title cannot be made good or a conveyance decreed. Plaintiffs joined defendant's wife, who was not a party to the contract of sale. The only allegation in the complaint touching her is as follows: "That said defendant *Eliza Miller* is the wife of the said defendant *H. S. Miller* and as such claims a right of dower in said premises." Each defendant entered a separate general demurrer. On behalf of the wife it is urged that the complaint fails to set forth any facts connecting her with the subject matter of the suit and therefore she is neither a necessary nor a proper party. Being the wife of the defendant who is the owner of the land in controversy, she has, as is alleged in the complaint, an inchoate right of dower therein, and her interest is adverse to the plaintiffs within the meaning of sec. 2603, Stats. (1898). *Foster v. Hickox,* 38 Wis. 408; *Hausmann Bros. Mfg. Co. v. Kempfert,* 93 Wis. 587, 67 N. W. 1136; *Hunt v. McDonald,* 124 Wis. 82, 102 N. W. 318; *Mash v. Bloom,* 126 Wis. 385, 105 N. W. 381; *Huntzicker v. Crocker,* 135 Wis. 38, 115 N. W. 340. True, not having joined in the contract of sale, she is not a necessary party. *Foster v. Hickox,* 38 Wis. 408; *Hunt v. McDonald, supra.* But being a proper party defendant, she cannot successfully demur on the ground that she is not a necessary party. *Foster v. Hickox, supra.* Should the wife refuse to join in the deed and release her dower interest, it might become necessary to determine the value thereof and deduct it from the purchase price. For in a case where the wife of the vendor refuses to join to bar her dower right the vendee has the op-

tion to decline to take a deed from the husband alone, and sue for breach of the contract, or he may accept such deed as part performance and retain from the purchase price a sum equal to the value of the wife's contingent interest. *Wright v. Young,* 6 Wis. 127; *Conrad v. Schwamb,* 53 Wis. 372, 378, 10 N. W. 395; *Zebley v. Sears,* 38 Iowa, 507; *Hession v. Linastruth,* 96 Iowa, 483, 65 N. W. 399; *Noecker v. Wallingford,* 133 Iowa, 605, 111 N. W. 37; *Park v. Johnson,* 86 Mass. 259; *Hazelrig v. Hutson,* 18 Ind. 481; Pomeroy, Spec. Perf. sec. 462. The case of *Wright v. Young, supra,* points out how the value of such an interest should be ascertained. If the contingency suggested should arise, the wife ought to have her day in court on the question of the value of her dower interest, and she was for that reason alone properly made a party defendant.

The only contention in support of the husband's demurrer is that there is no sufficient allegation of a tender. The complaint alleges "that by the terms of said contract said plaintiffs were to and did pay the sum of $1,400 in cash at the date of said contract, and were to pay the further sum of $14,000 sixty days from the date of said contract, at River Falls, Wisconsin." It further alleges:

"That on the 28th day of November, 1910 (being the sixtieth day), said plaintiffs, pursuant to the terms of said contract, came to River Falls, Wisconsin, with $14,000 in United States legal tender, and did then and there make due and legal tender of said money to said defendant *H. S. Miller,* and demanded said deed and abstract and possession of said premises, and said defendant *H. S. Miller* then and there wholly failed, neglected, and refused to deliver said warranty deed and said abstract of title to said plaintiffs and has ever since so refused."

Counsel for appellants claims that the allegations as to tender are insufficient because they are doubtful, uncertain, and ambiguous. But he inadvertently or studiously omits to point out wherein they are so. As we are unable to discern

the alleged insufficiency, we quite naturally reach the conclusion that it does not exist. The complaint undoubtedly states a good tender, and argument to support such a conclusion would serve only to confuse what is plain.

By the Court.—Order affirmed.

STATE JOURNAL PRINTING COMPANY, Respondent, vs. CITY OF MADISON, Appellant.

February 1—February 20, 1912.

(1) *Trial: Setting aside perverse verdict.* (2–5) *Municipal corporations: Liability for negligence: Waterworks: Improper construction: Reliance on expert advice: Break in main: Injury to property: Delays in stopping flow: Questions for jury.* (6) *Appeal: Questions considered: Matters not litigated.*

1. Where the answer to one material question of a special verdict plainly shows that the jury made such answer perversely or by reason of passion or prejudice, the court may properly set the entire verdict aside, and should do so unless satisfied that the answers to the other questions were not affected by such perversity, passion, or prejudice.
2. In furnishing water to private consumers a municipal corporation is acting in a private business capacity and not in its governmental capacity, and for any failure to exercise ordinary care proximately causing injury to another is liable to the same extent as a private person or a corporation operating a waterworks system.
3. While it would be negligence to attempt to construct and operate a system of waterworks without expert advice as to the location of valves, the size and strength of pipes, and other details of construction, yet in a case where reputable engineers differ in their opinions it cannot be held a want of ordinary care to adopt in good faith a plan proposed by one school of experts in preference to another; and should an accident happen resulting in damage to a third person, proof of such good-faith action based on the advice of competent and reputable experts furnishes a complete defense against liability. *Piper v. Madison*, 140 Wis. 311, explained.

4. The fact that the location of a valve 260 feet distant from a water tower, instead of in the basement of the tower where the feed pipe turns upward, is not in accordance with the best engineering, does not establish negligent construction, without proof of some added danger on that account; and where, in a water system embracing an average of twenty-nine miles of mains, there have been but three breaks in the mains in twenty-four years, and the 260 feet of pipe leading to the water tower is located at the highest point of the system and is not tapped by service pipes, the likelihood of a break therein is, *it seems*, so remote as scarcely to be a substantial factor in the problem of location of such valve.
5. Where water was found to be entering the cellar of plaintiff's premises in the vicinity of a water tower on defendant's system, and defendant's employees, uncertain where the leak was located, spent three hours in uncovering and shutting off nine valves which controlled the water supply of that district, and in consequence plaintiff's premises were flooded and its property damaged, when by opening a valve in the waste pipe of the water tower and two hydrants near by, and reducing the water pressure temporarily, the tank in the tower, from which the water was coming, could have been emptied in a few minutes, it was a question for the jury whether defendant was chargeable with negligence.
6. The claim that the city was liable in such case on the ground that the water tower was a nuisance because located in a public street, will not be considered on appeal, where no such claim was made in the complaint or at the trial.

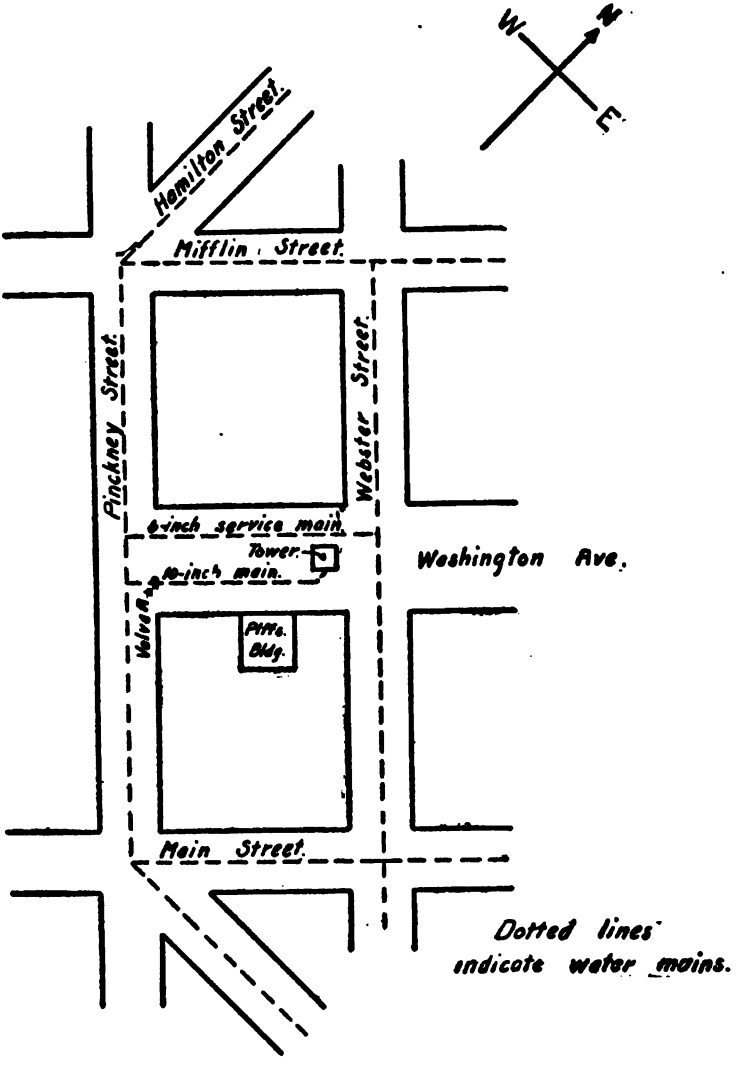
APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This is an action for damages resulting from water which escaped from a broken main in the water system of the city of *Madison* and inundated the cellar of the plaintiff, inflicting damage by way of destruction of print paper, stereotype molds, etc. The accident happened on the morning of January 17, 1907, and is the same accident involved in the case of *Piper v. Madison,* 140 Wis. 311, 122 N. W. 730, the plaintiff here occupying the major part of the same building which the Piper Bros. occupied at the time of the accident.

The important facts appearing on the trial are that the city of *Madison* owned and operated its own system of direct

pressure waterworks, which were originally constructed in the year 1885. In the year 1890 a tower or standpipe was added to the system, principally for the purpose of equalizing the pressure, but also serving the purpose of a small reservoir. This water tower was located on East Washington avenue, one block northeast from Pinckney street. It is a brick structure, 161 feet in height over all, and contains a cylindrical metal tank twelve feet four inches in diameter and sixty feet in height, capable of holding about 54,000 gallons of water, the bottom of which is seventy-two feet above the ground. This tank is supplied with water by a ten-inch main, hereinafter called the feed main, starting from the Pinckney street main and running into the base of the tower, then turning upward and running into the bottom of the tank. As originally constructed in 1890 the supply of water to the tower was controlled by a valve in the feed main located inside the base of the tower just before the main turns upward. It appears, however, that as time went on this valve became very hard to open on account of the sweating of the upright pipe and the dripping of water and the consequent gathering of rust, and that in 1898 (not in 1891, as testified to in the *Piper Case*) it became impossible to close it, and the water commissioners of the city determined to and did discontinue its use, and placed a valve in the feed main at the northeast line of Pinckney street, 260 feet distant from the tower. This valve is called "valve A" in the case, and its position with reference to the water tower and the water system of the city will be easily seen by reference to the accompanying plat of the immediate surroundings. As will be seen by reference to the plat, the ten-inch feed main was laid somewhat to the southeasterly side of the street, while on the northwesterly side and some twenty feet distant was a six-inch main, from which service pipes ran to consumers along the street. There were no service pipes connected with the ten-inch main. Its function was simply to feed the standpipe or tower. Wash-

ington avenue was and is a business street, with shops and stores on each side, and the plaintiff's building was located, as



indicated on the plat, nearly opposite the middle of the feed main but somewhat nearer to the tower than to Pinckney

street, and the service pipes from the building ran across to the six-inch main. Valves were also located in the water mains at the various street corners, so that, if necessary, the six-inch service main could be cut off from the balance of the water system, but in order to make the segregation complete it required the closing of nine valves. There was in the bottom of the tank a two-inch waste pipe with a valve which could be opened by hand and which would discharge the water in the tank into a six-inch pipe connecting with the sewer system in three and one-half or four hours. To turn this valve a man simply had to ascend the stairway in the base of the tower to the bottom of the tank.

On the morning in question, at about 7:15 o'clock, water was discovered flowing into the basement of the plaintiff's building through and around the basement windows, and the waterworks officials were at once notified. Employees of the department were immediately sent to remedy the difficulty if possible, and arrived on the scene at about 7:30 o'clock. After examining the flow of water the waterworks employees concluded that the escaping water probably came from a broken service pipe, and they first shut off valve A, controlling the feed pipe, and then, as rapidly as possible, closed the remaining eight or nine valves necessary to completely cut off the six-inch service pipe from the water system. This took more than two hours, largely on account of the fact that it was winter and hence it required some time to locate and uncover the valves in the streets on account of accumulated snow and ice. The valve in the waste pipe at the bottom of the tank was not opened by any one, because it was supposed that the break was in one of the service pipes or the six-inch service main. The closing of the nine valves occupied something more than two hours, and within fifteen minutes thereafter, or at about 10 o'clock, the flow of water into the basement ceased. The city employees then seem to have suspected that the break might be in the feed main, and they opened

valve A for a few moments and discovered that the flow commenced again. They then closed it, and proceeded to thaw out the ground over the feed main and dig down to it. On the third day they found a break in that main opposite the plaintiff's building, and it is not denied that the flood was caused by the escape of the water in the tank through the broken feed main.

The grounds of negligence relied on by the plaintiff were (1) the abandoning of the valve in the base of the water tower, and placing the sole controlling valve at a distance of 260 feet from the tower, and (2) the failure to empty the water tower by opening hydrants and reducing pressure, or by opening the two-inch waste pipe valve at once.

The following special verdict was returned by the jury:

"(1) Did the defendant fail to exercise ordinary care in abandoning the valve in the base of the water tower and in putting one in place thereof at Pinckney street? *A.* No.

"(2) After defendant knew that water was coming into the plaintiff's building, did the defendant fail to exercise ordinary care in stopping the water from flowing out of the broken pipe into plaintiff's building? *A.* No.

"(3) If you answer 'Yes' to either or both questions number 1 or number 2, was such want of ordinary care the proximate cause of the loss or damage resulting from the flooding of plaintiff's basement and vault? *A.* No.

"(4) What sum will measure the damage done by water from the broken water pipe, wholly excluding from this answer any damage done to the stereotype plates and boxes in the vault? *A.* No damage.

"(5) What sum will measure the damage done to the stereotype plates and the boxes in which they were contained? *A.* No damage."

On this verdict, after overruling motions made by each party for judgment on the verdict, the court set aside the verdict on the ground that it was perverse, and granted a new trial. From this order the defendant appeals.

For the appellant there were briefs by *John A. Aylward,*

city attorney, and *Aylward, Davies, Olbrich & Hill,* of counsel, and oral argument by *John A. Aylward.* They cited, among other authorities, *Piper v. Madison,* 140 Wis. 311, 122 N. W. 730; *McCarthy v. Syracuse,* 46 N. Y. 194; *Jenney v. Brooklyn,* 120 N. Y. 164, 167, 24 N. E. 274; *Chicago v. Selz, S. & Co.* 202 Ill. 545, 67 N. E. 386; *Rice v. St. Louis,* 165 Mo. 636, 65 S. W. 1002; *Hubbell v. Yonkers,* 104 N. Y. 434, 10 N. E. 858; *Lafflin v. Buffalo & S. W. R. Co.* 106 N. Y. 136, 12 N. E. 599; *Stringham v. Hilton,* 111 N. Y. 188, 18 N. E. 870; *Birmingham U. R. Co. v. Alexander,* 93 Ala. 133, 9 South. 525; *Pueblo Bldg. Co. v. Klein,* 5 Colo. App. 348, 38 Pac. 608; *Blyth v. Birmingham W. W. Co.* 11 Exch. 781; *Terry v. Mayor, etc.* 8 Bosw. 510; *Green v. Chelsea W. W. Co.* 70 L. T. Rep. 547; *Morgan v. Duquesne,* 29 Pa. Super. Ct. 100; *Rumsey v. Philadelphia,* 171 Pa. St. 63, 32 Atl. 1133; *Paris v. Tucker* (Tex. Civ. App.) 93 S. W. 233; *McCord R. Co. v. St. Joe W. Co.* 181 Mo. 678, 685, 81 S. W. 189; *Hunt v. Mayor, etc.* 109 N. Y. 134, 142, 16 N. E. 320; *Todd v. Cochell,* 17 Cal. 97; *Boughton v. Midland G. W. R. of I. Co.* 7 Ir. Rep. (C. L.) 169; *Kibele v. Philadelphia,* 105 Pa. St. 41; *Ettlinger v. New York,* 58 Misc. 229, 109 N. Y. Supp. 44.

For the respondent there was a brief by *Gilbert, Jackson & Ela,* and oral argument by *F. L. Gilbert* and *Emerson Ela.*

WINSLOW, C. J. In our judgment the court was entirely justified in setting aside the special verdict as perverse. There was no controversy in the case as to the fact that substantial damage had been suffered by the plaintiff and the trial court practically so instructed the jury, leaving only to them the question of the exact amount thereof. Disregarding the undisputed evidence, as well as the charge of the court, the jury affirmatively found that there was no damage. Where the answer to one material question of a special verdict plainly shows that the jury made the answer perversely

or by reason of passion or prejudice, the court may well set the entire verdict aside, and indeed should do so unless satisfied that the answers to the other questions were not affected by such perversity, passion, or prejudice. *Lines v. Milwaukee,* 147 Wis. 546, 133 N. W. 592. If this were the only question arising upon this appeal we should have no difficulty in affirming the order granting a new trial, but the defendant contends that there was no evidence of negligence in the case, and hence that no new trial should have been granted even if the verdict were perverse.

This contention presents a question of much greater difficulty, and requires a critical examination of the evidence bearing on the two claims of negligence.

In furnishing water to private consumers the city is acting in a private business capacity and not in its governmental capacity, and it is bound to exercise ordinary care, namely, that reasonable degree of care in view of the dangers involved which the great mass of ordinarily prudent persons engaged in the same or similar business would and do exercise under like circumstances. For any failure to exercise this degree of care, proximately causing injury to another, the city is liable to the same extent that a private person or a corporation operating a waterworks system is liable; no more and no less. 4 Dillon, Mun. Corp. (5th ed.) § 1670; Jones, Neg. Mun. Corp. § 40; *Jenney v. Brooklyn,* 120 N. Y. 164, 24 N. E. 274; *Piper v. Madison,* 140 Wis. 311, 122 N. W. 730, and cases cited therein.

The first claim in the present case is that the city officials were negligent in the matter of construction of the plant; that is, that the valve which controlled the supply of water to the elevated standpipe or tank in the water tower was negligently placed at a distance of 260 feet from the base of the tower, when it should have been placed, or another valve should have been placed, inside of the tower at the nearest practicable point to the angle where the feed pipe turns up-

ward. It seems beyond question that had there been a valve inside the base of the tower (as it was originally placed) and maintained in working order, the contents of the tower would, by the closing of the valve, have been prevented from flowing into the basement of plaintiff's building. However, it is very evident that this is not the controlling question. The question is whether it was want of ordinary care to locate the valve as it was located in 1898, and abandon the valve in the tower, and, if so, whether that want of ordinary care was the proximate cause of the injury.

The question of the location of the valves in a water system, like many other questions, as, for example, the size and strength of the pipes, the power and quality of the engines and pumps, the location of the pumping station, etc., is a question which manifestly cannot be safely determined by the nonexpert layman. When a private firm, or a corporation composed of laymen, proposes to install a system of waterworks they must necessarily on all such questions consult expert hydraulic engineers and be guided by their advice. We assume that it will be admitted at once that this must be so, and that any other course would not only constitute a lack of ordinary care but an actual invitation to disaster. No authorities seem necessary to support so plain a proposition. Such being the rule applicable to private firms or corporations, it must be held that the same rule applies to the city when it enters this field. It becomes *pro hac vice* a private proprietary corporation and assumes the liabilities and obligations of a private corporation so far at least as the exercise of care is concerned.

It is very well known that there are many expert engineering problems upon which able and distinguished engineers do not entirely agree. The disagreement of doctors is proverbial, and the disagreement of experts in other lines of applied science almost equally so. When a practical question arises with regard to the construction of a water system and there is

a disagreement between hydraulic engineers of acknowledged ability and repute as to the proper course to be pursued, the question becomes an important and delicate one, and especially so to the nonexpert layman who is investing large sums in the plant with the hope of future returns. He must choose one course or the other if he is to complete his enterprise. Each plan may be supported by acknowledged authorities in hydraulic engineering, and the weight of authority may be practically evenly balanced. What then is he to do? Is he guilty of negligence or want of ordinary care if, after careful investigation, he determines in good faith to adopt the plan proposed by one school of experts and reject the other, and at some distant day an accident happens which would have been avoided had the other plan been adopted? We cannot think so. To so hold would be to demand of the layman not merely extraordinary care, but practical omniscience on a technical and expert subject. He must accomplish the impossible or pay the penalty in damages. He must exercise more care than the man of extraordinary prudence can possibly exercise. If this question be answered in the negative it is very obvious that when an accident happens and the question arises whether there has been want of ordinary care in the construction of some part of the water system, resulting in damage to a third person, it must be competent for the owner of the system, whether such owner be a private firm or corporation, or the city itself, to show that in adopting the method attacked it acted in good faith upon the advice of competent and reputable experts, and only acted after it had taken such advice. This showing, if fully established, must constitute a defense because it affirmatively establishes the exercise of reasonable and ordinary care, and it cannot be overcome by a showing that some other experts, although of equal competency, would have advised or actually did advise a different course. *Service v. Shoneman,* 196 Pa. St. 63, 46 Atl. 292. This latter class of evidence is doubtless admissible

on the general question, and especially on the question whether the owner of the system acted in good faith on the advice received by him; but if such good-faith action, based upon the advice of competent and reputable experts, be established, the owner must be absolved from the charge of want of ordinary care. In the present case the city attempted to show by the testimony of the superintendent of the water system that when the valve in the base of the water tower became useless and practically incapable of movement from rust, in 1898, the water commissioners sought and obtained the advice of Mr. Edwin Reynolds of Milwaukee, an expert hydraulic engineer of acknowledged reputation, and that he advised the abandonment of that valve and the installation of a control valve outside the structure at or about the place where valve A was in fact located. This testimony was objected to and excluded, apparently upon the idea that it was held to be inadmissible in *Piper v. Madison,* 140 Wis. 311, 122 N. W. 730. While there are some expressions in that case which, if not carefully read in connection with the whole opinion, might seem to justify that idea, it is very certain that no such rule was laid down or contemplated in that case. The charge to the jury in that case was deemed to convey to the jury the idea that the city in building and operating waterworks to supply private consumers was exercising a purely governmental function, and hence, following the long line of cases beginning with the case of *Hayes v. Oshkosh,* 33 Wis. 314, was not liable for the negligent acts of its servants or agents in performing their duties. This was held to be an erroneous view of the case, and the city was held to be acting in a private capacity, just as an individual or private corporation would act doing the same business, and hence liable for the negligent acts of its servants and agents.

This is the sum and substance of the holding in the *Piper Case,* and it is manifest that it does not exclude the testimony which was offered in the present case concerning the consulta-

tion with Mr. Reynolds and the advice which he gave the water commissioners. This error was not prejudicial to the plaintiff, inasmuch as the jury returned a favorable answer to the question covering this point notwithstanding the exclusion of the evidence aforesaid, but as there must be a new trial of the case the question is considered necessary to be treated.

Even in the absence of this evidence, however, we have not been able to convince ourselves that there is any evidence in the record which would justify a verdict that there was any negligence proximately causing the plaintiff's injury in the location of the supply valve at the point A, 260 feet distant from the base of the tower.

The evidence bearing on the subject came from hydraulic engineers. Three engineers, called by the plaintiff, testified in substance that the supply valve should be placed within the foundation of the tower or immediately outside thereof, and that it was not good hydraulic engineering to place it at a distance of 260 feet, as it was placed in the present instance. Four engineers of apparently equal ability, called by the defendant, testified that the actual location of the valve accorded with the best engineering principles and practice. Practically all of the engineers agreed that the only possible added danger resulting from placing the valve where it actually was placed was the liability of a rupture in the 260 feet of pipe between the valve and the tower, and that this danger was so remote as to be practically negligible, because the pipe was not tapped by service pipes and was subjected to the least pressure of any pipe in the system on account of its being located on the highest point of ground.

It is quite apparent that a given method may not be the very best engineering, or even passable engineering, and yet there may be no added danger on that account; in fact there may be less danger. The construction of such a system may be clumsy, or the appliances and materials used unnecessarily heavy and ponderous, so that any engineer would condemn it

as not a good engineering job, and yet the very things which would condemn it as clumsy engineering might render the system practically incapable of rupture. So it cannot be considered that negligence is established by the mere statement or finding that the location of the valve was not in accord with the best engineering; it must also appear that because of this location at the place in question some material danger was added which was not present when the valve was located in the basement of the tower, and which proximately caused the injury complained of. We do not find the evidence in the record before us, as it now stands, which would justify any such finding. It is shown without dispute that the water system of *Madison* had been in operation about twenty-four years prior to the accident and has had an average of twenty-nine miles of mains in use during that time, and that there have been but three breaks in the mains during the whole period. On that basis the likelihood of a break in the 260 feet of ten-inch feed pipe aforesaid, which sustains the least pressure of any pipe in the system, and is not weakened by any tapping, is so remote as scarcely to be a substantial factor in the problem of location of the valve.

Upon another trial the evidence may be different, and the evidence now lacking on this point may possibly be supplied, but as now it stands we find nothing to justify a finding of negligence proximately causing the injury in the relocation of valve A.

With regard to the second ground of negligence claimed, to wit, that the water officials were guilty of negligence in not discharging the contents of the water tower by opening the waste-pipe valve, or by reducing the water pressure and opening fire hydrants in the vicinity, we have had considerably more difficulty. The question is by no means clear. There were circumstances which would quite strongly tend to justify the belief which the water officials had and on which they acted, namely, that the break was either in the six-inch serv-

ice main or in the service pipe therefrom, but, on the other hand, there was no certainty where it was and no present means of ascertaining. It might well be in the ten-inch feed main, and if so the opening of the two-inch waste pipe at the bottom of the tank was an obvious means of partial relief and one which could be performed in a few moments. There was also, it seems, another means of relief which would be effective whether the break were in the ten-inch feed pipe or in the six-inch service main, namely, the opening of two or three hydrants in the immediate vicinity and the lowering of the pumping pressure to thirty pounds. The testimony tended to show that by the opening of the waste-pipe valve alone the tank would probably have been emptied in an hour and a half as a result of the combined action of the waste pipe and the leak. The testimony also tended to show that by opening two six-inch hydrants in the immediate vicinity and reducing the pumping pressure to thirty pounds, the tank would probably have been emptied in about twenty minutes. Under these circumstances, while it is felt that the case is close to the border line, the court feels compelled to hold that upon this second claim of negligence there is under the evidence a question for the jury as to whether the water officials exercised ordinary care in meeting the difficulty when they spent nearly three hours in uncovering and shutting nine valves in order to cut off this part of the system from the rest.

It is suggested by respondent that the water tower is a nuisance, because it is erected in the public street, and that, irrespective of any other question in the case, it should be held that the city is liable for all damage caused by water escaping from it.

It is sufficient to say that no such claim of negligence was made in the complaint nor upon the trial. It is not within the issues as made by the pleadings, nor was it actually litigated. This renders it unnecessary to consider the question.

By the Court.—Order affirmed.

VAN WIE and another, Respondents, vs. SOUTHERN WISCONSIN POWER COMPANY, Appellant.

February 1—February 20, 1912.

Dams: Flowage of land: Measure of damages: Market value: Adaptability to business uses: Profits: Evidence: Instructions to jury: Excessive damages.

1. In determining the damage to land from the flooding of a part thereof by means of a dam, evidence of the profits of a business theretofore conducted on the land is not competent to establish the market value of the land; but evidence of the adaptability of the land to business purposes is admissible and proper to be considered.
2. The lands flooded in this case were of an unusual character, being located at the broadening of a ravine or canyon of scenic beauty, frequented by tourists, and improved by a building which had been used as a restaurant, boarding house, etc. The witnesses testifying as to the value of the land took into consideration that the business conducted there would produce an income, but, although they did not use the words "profits" and "income" with strict nicety, did not base their estimates of value on the actual profits that had been or were expected to be realized from such a business. The court explicitly instructed the jury to find as the measure of damages the difference, if any, in the market value of the property before and after flowage, and told them that they could not allow any sum for any injury to the business conducted on the land, and that in fixing the market values they could not assess any sum for remote or speculative values or consider any speculative or remote use to which the property might be put. *Held*, that there was no error prejudicial to the defendant in the admission of such testimony and submission thereof to the jury.
3. An award of $4,500 for the injury to plaintiffs' land by the flowage thereof is *held* not excessive as a matter of law.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The plaintiffs, mother and son, own a triangular piece of land, about eight acres in extent, near the Wisconsin river, above the village of Kilbourn City, Adams county, Wisconsin.

Plaintiffs' land is separated from the river by a strip of land about 300 feet wide owned by the defendant. Extending from the river across defendant's and the plaintiffs' land is a deep, irregular, rocky ravine known as Cold Water Canyon. The sides of the canyon are steep, covered with ferns, shrubs, and trees, and are of great scenic beauty. Along the bottom of the canyon flows a small stream of spring water. The canyon is narrow except in one place on plaintiffs' land, near the boundary between it and the defendant's land, where it is broadened out to a width of 100 to 125 feet. The area of this wide portion of the bottom is about two and one-half acres. Upon that part of the spread nearest to the defendant's land there is located a building, which during and prior to 1907 was used as a restaurant and boarding house, and here soft drinks, peanuts, souvenirs, etc., were sold to tourists passing up and down the canyon. A dancing pavilion, ice house, etc., had also been constructed and were used for the entertainment of tourists. This level spread of the bottom of the canyon is from thirteen to fourteen feet above the normal level of the water of the Wisconsin river at the mouth of the canyon. Tourists visiting the plaintiffs' premises in the canyon usually came through Cold Water Canyon from the river, but access thereto could be had by rights of way to the river and the public highway which were owned by the plaintiffs. The spread in the canyon had no value for agricultural purposes; its value arose from the fact that it was the only place in the canyon where buildings could be constructed for the entertainment of tourists and because a toll might be charged tourists for passing through this portion of the canyon. The tourist season to the Dells of the Wisconsin, with which Cold Water Canyon is connected, is during the months of June, July, and August. Since 1907 the plaintiffs have not conducted their business in the canyon.

The defendant corporation has erected and maintains under state and federal authorization a dam for power purposes

across the Wisconsin river, some distance below the mouth of Cold Water Canyon. The completed dam is designed to raise the normal level of the water of the river at the mouth of the canyon fourteen feet. The work was commenced in September, 1907, and completed in July, 1909. In 1908 the backed-up water began to overflow the plaintiffs' land, and the buildings are now normally surrounded by from six to twelve inches of water.

The action was commenced before the construction of the dam was begun, by a petition of the defendant for the appointment of commissioners to appraise the damages to be awarded the plaintiffs by reason of the flowage upon the lands of the plaintiffs because of the construction of the dam. Under stipulation the appeal from the award of the commissioners was tried before the Sauk county circuit court. There was evidence that the value of plaintiffs' entire property was from $8,000 to $12,000 before the flowage and that its value was almost entirely due to the adaptability of the spread in the canyon for carrying on a business as above described, and that its value after the flowage was from $500 to $8,000. There was evidence tending to show that the water backed up onto plaintiffs' land was stagnant, that this rendered the canyon unattractive to tourists, and that it was impracticable to remove the buildings to higher ground and there carry on the business. In behalf of the defendant there was evidence that except in times of flood or high water only about six tenths of an acre of plaintiffs' land was overflowed by reason of the construction of the dam, that the buildings could be removed to higher ground, and that the damage to plaintiffs' property because of the flooding by the dam was from $300 to $500.

This is an appeal from the judgment on the verdict awarding plaintiffs $4,500 as the damages caused them by the construction of the dam.

For the appellant there were briefs by *Jones & Schubring* and *F. R. Bentley,* and oral argument by *Mr. E. J. B. Schu-*

bring and *Mr. Bentley.* They cited Lewis, Em. Dom. (3d ed.) § 727 (487); *In re Dept. Pub. Works,* 53 Hun, 280, 6 N. Y. Supp. 750; *De Buol v. F. & M. R. R. Co.* 111 Ill. 499; *Cobb v. Boston,* 109 Mass. 438; *Cox v. P. H. & P. R. Co.* 215 Pa. St. 506, 64 Atl. 729; *Reading & P. R. Co. v. Balthaser,* 126 Pa. St. 1, 13 Atl. 294, 17 Atl. 518; *San Diego L. & T. Co. v. Neale,* 88 Cal. 50, 25 Pac. 977; *Hamilton v. P., B. & L. E. R. Co.* 190 Pa. St. 51, 42 Atl. 369; *Jacksonville & S. E. R. Co. v. Walsh,* 106 Ill. 253; *Cook & R. Co. v. Sanitary Dist.* 177 Ill. 599, 52 N. E. 870; *Dupuis v. C. & N. W. R. Co.* 115 Ill. 97, 3 N. E. 720; *Sacramento S. R. Co. v. Heilbron,* 156 Cal. 408, 104 Pac. 979; *Edwards v. Cheyenne* (Wyo.) 114 Pac. 677; *Munkwitz v. C., M. & St. P. R. Co.* 64 Wis. 403, 25 N. W. 438; and other cases.

For the respondents there was a brief by *Grotophorst, Evans & Thomas,* and oral argument by *H. H. Thomas.*

SIEBECKER, J. It is contended that the court erred in submitting to the jury evidence of the profits of the business carried on upon the property in question. It is not questioned that evidence of the profits of a business conducted upon the land in question before the alleged flowage is not competent to establish the market value of the land, nor is there dispute between the parties that evidence of the adaptability of the land for business purposes is a consideration which goes to show the value and is properly to be submitted to a jury to ascertain the damages to land from flooding a part thereof. This latter element of value is entirely distinct from the former and is proper to be considered in estimating the value of such land before and after flowage. It is strenuously contended that the opinion of the plaintiffs' witnesses as to the value of this property is shown to have been based upon the profits of the business theretofore conducted on this land and that such evidence was incompetent and operated to the prejudice of the defendant. The court by special ques-

tion submitted to the jury the inquiry of finding the difference in market value of the land in question before and after the construction of the dam causing the flowage, and in connection therewith explicitly informed the jury that the difference in the market value of the property before and after the flowage, if any, constituted the damage caused thereby to the land, and directed them that "In fixing this market value you cannot allow any sum for any injury that may have resulted to the business that the plaintiffs conducted on the land," and also, "In fixing this market value you cannot assess any sum for remote or speculative values, or consider any speculative or remote use to which the property might be put." It is manifest that the court properly limited the jury to a consideration of the evidence on the question of market value. Treating the evidence received in the light of this inquiry, can it be said that the witnesses based their estimates of value on the profits realized in the business that had been conducted on the premises? The evidence shows that the witnesses took into consideration that the business conducted there would produce an income. Though the witnesses, in phrasing their testimony, did not use the words "profits" and "income" with strict nicety, yet it is plain that in giving their estimates of the value of this land they meant and included in their estimates of value the element of the adaptability of the lands for conducting a profitable business thereon of the nature of that which had been conducted on the premises; but the evidence does not warrant the claim that such estimates were based on the actual profits that had been realized or that were expected to be realized from such a business. We are persuaded that the jury under the instructions and directions of the court understood correctly the bearing of such evidence and were not misled to the prejudice of the appellant, and that no error was committed in submitting this evidence to the jury. The property in question is of an unusual character and is restricted in its uses for business purposes, and its

market value depends in a material degree upon the nature and kind of business that could be successfully conducted thereon. These conditions made its adaptability for profitable business purposes an essential and proper consideration to be taken into account by the witnesses in giving their opinions of its market value. These facts also had an important bearing on the question for determination by the jury, namely, the amount of damages sustained by the plaintiffs on account of the alleged flowage. Under the facts and circumstances shown it is clear that this inquiry, of necessity, calls for the exercise of judgment by a jury and hence is an inference to be drawn by them from the facts and circumstances.

We cannot say as matter of law that the damages awarded are excessive. There is no room for argument that the witnesses were not qualified to give their opinions as to the value of the property nor for the claim that the market value of the property was but slightly affected by the flowage because plaintiffs could readily remove their buildings to other points on the premises and continue their business. These questions were within the jury's field and must be held to have been properly determined by them.

The claim that the premises were within the limits of ordinary high- and low-water mark is not sustained by the evidence.

The alleged improper remarks of counsel in argument to the jury are not set out in the record, nor can they be held, if made as claimed in oral argument, to have affected the substantial rights of the parties.

By the Court.—Judgment affirmed.

KERWIN, J., took no part.

CHARNLEY, Appellant, vs. CHARNLEY, Respondent.

February 1—February 20, 1912.

Divorce: Division of property.

One and one-half acres of land were purchased with $300 of the wife's money. Later the husband purchased an adjoining acre with his own money, made various improvements, and built a house. Fourteen years afterwards the premises were sold for $2,900, with $1,800 of which an eighty-acre farm was bought in the wife's name. This farm was maintained and improved by the combined efforts and contributions of husband and wife, although he worked the larger part of the summer season as a bricklayer, leaving his wife and children to carry on the farm, and furnishing them little or no money. Out of a legacy received by the husband he paid off an incumbrance of $666 on the farm. In an action by the wife for divorce, the court found the value of defendant's personal property to be $1,400 and the value of the farm $3,500. *Held*, that in making a division of the property the wife should have the farm and personalty, charged with the payment to the husband of $1,500, in addition to certain payments already made by her pursuant to the judgment of the court below.

APPEAL from a judgment of the circuit court for Sauk county: E. RAY STEVENS, Circuit Judge. *Modified and affirmed.*

This is an appeal from that part of an interlocutory decree of divorce affecting the property rights of the parties. The facts relating to the property of the parties are as follows:

The parties were married in 1872. At that time the defendant had about $100; the plaintiff had $700 from her parents. For about three years after the marriage the parties lived near Chicago, Illinois, where the defendant used and lost in unsuccessful business ventures $300 of the plaintiff's money. About $100 of the plaintiff's money had been used in the purchase of household furnishings. Upon leaving Chicago the parties moved to Wisconsin, and in 1876 the

rest of plaintiff's money, $300, was used in the purchase of one and one-half acres of unimproved land at Wauwatosa, Wisconsin. Subsequently the defendant purchased an additional acre adjoining the land plaintiff had previously purchased. The title to these parcels of land was taken in the name of the plaintiff. Trees were planted by the defendant and other improvements were made by him upon the premises. A house was built by him. For fourteen years this was the residence and home of the parties. During this period the defendant worked more or less in the city at his trade of bricklayer, sending the plaintiff small sums of money, but insufficient to support her. The care of the household and the work in the garden on these premises was performed by the plaintiff and she also kept boarders during this period. During their residence at Wauwatosa the defendant received a legacy of $2,000, of which about $500 appears to have been used to pay off a mortgage debt. The evidence does not show what disposition the defendant made of the balance of this legacy. When this Wauwatosa property was sold in 1890 for $2,900, indebtedness to the amount of $400 was paid, and with $1,800 of the balance a farm of eighty acres was purchased in Sauk county, the title being taken in the name of the plaintiff. Apparently some of the money received from the Wauwatosa property was used in the purchase of personal property. The defendant has worked at his trade at Reedsburg and when he returned home to the farm would bring food supplies with him as requested by the plaintiff. At first the work on the farm was largely done by the plaintiff with the assistance of her children; of late years practically all of the work has been done by them. It appears that the defendant has not furnished the plaintiff with money. In July, 1909, the defendant received another legacy of $2,360. Of this legacy, $666 was used to clear the farm of an incumbrance. The defendant used a part of it to purchase some

household furnishings and personal articles for the children. The balance has been disposed of by the defendant. The plaintiff testified that the coat she wore at the time of the trial was the first coat the defendant had ever purchased for her. There is no dispute that the defendant purchased the acre of land adjoining that purchased and owned by the plaintiff at Wauwatosa.

The trial court found the value of the defendant's personal property to be $1,400 and that the farm in the plaintiff's name was worth $3,500; that the Wauwatosa home had been purchased "with $300 of plaintiff's separate estate; that the same was improved and its value largely increased by defendant's labor and with his earnings." This finding is evidently not intended to refute the undisputed fact that the adjoining acre was purchased by the defendant. The court also found as follows:

"6. That the defendant spent most of his time during the summer season at work as a mason; that plaintiff has stayed on the farm, worked outdoors and carried on the farm with the help of their children; that the plaintiff has been frugal and saving; that the defendant has been addicted to excessive drinking, has spent his money freely, and is not of a saving disposition; that he is no longer able to do hard manual labor; that he has not attempted to carry on the farm work for some years past; that he receives a pension of $12 a month."

Upon the findings the court held that the $300 of plaintiff's money invested in the Wauwatosa home should be restored to her with interest, amounting to $900 for principal and interest; and that the farm and all the personal property of the defendant should vest absolutely in the plaintiff, on condition that the farm should be charged with the payment of $2,500 to the defendant. The court also specified that the $2,500 should be paid in monthly instalments of $25 and that interest should be allowed the defendant on the unpaid part of this amount.

The plaintiff appeals from the interlocutory judgment en-

tered and complains that the division of the property so ordered is unjust and inequitable as to her.

Chas. H. Stone, for the appellant.

Daniel Ruggles, for the respondent.

SIEBECKER, J. The plaintiff appeals from those parts of the judgment establishing the interest of each of the parties in the farm and making the final division and distribution of the real and personal property of the defendant. The evidence set out in the foregoing statement of facts is without dispute as to the amount each party contributed to the purchase of the real estate at Wauwatosa and as to the fact that the wife contributed from earnings to the improvement of this property and of the farm in Sauk county, to which she held the exclusive title. Under the evidence we are persuaded that the sum of $900, which the court awarded her as and for her interest in the Sauk county farm, is not a sufficient amount to restore to her the just share she has in the farm. The facts plainly establish that her interest therein exceeds that amount. Since she has title to the whole thereof, the pertinent inquiry is, What part of this farm so held by her did she derive from her husband? It is clear that he contributed the purchase price for one acre of the Wauwatosa home and that he contributed part of the means to make the improvements thereon. The proceeds of the sale of the property were invested in the Sauk county farm, upon which the parties resided, and which they maintained and improved by their combined efforts and contributions. It appears that the defendant paid a mortgage on the farm, amounting to $666, out of an inheritance. In view of the facts of the case it cannot be said that more than one half of the value of this farm, so held by the plaintiff, was derived from the defendant. Hence his interest therein and the personalty, valued at $1,400, amount to about $3,100. Under the judgment of distribution of his estate the court awarded him $2,500, to be

paid to him in instalments of $25 per month, with interest on the unpaid portion, and charged the wife's entire estate with a lien to secure its payment. It is obvious that the plaintiff will be unable to negotiate a mortgage loan on the premises to pay defendant this sum. Nor is it probable that she could borrow such a sum by mortgaging the personalty with the real estate. Should she succeed in doing so, in all probability she would be unable to pay the taxes, the interest on the loan, and the annual expense for upkeep. In such an event her property, including her separate estate, would be absorbed to meet the obligation imposed by this judgment. Under the circumstances we cannot approve this division of the defendant's estate as equitable between the parties. We are of the opinion that the trial court awarded the defendant too large an amount, that the defendant should receive no more than $1,500 in addition to the payments plaintiff has actually made on the judgment to this date, February 20, 1912, and that the judgment should be modified accordingly. Laws of 1909, ch. 323; Laws of 1911, ch. 239. This will enable the plaintiff to obtain the amount to be paid the defendant and thus make the final distribution of the defendant's property as determined by the judgment of the court.

By the Court.—It is so ordered. Neither party is to recover costs on this appeal. The respondent is to pay the clerk's fees in this court.

IN RE RUTLAND DRAINAGE DISTRICT: BIXBY, Appellant, vs. PARISH and others, Respondents.

February 2—February 20, 1912.

Lakes and ponds: Navigability: Legislative declaration: Question of fact.

1. The power of the legislature to declare that nonmeandered lakes are neither navigable nor public waters, is *doubted.* Assuming that it has such power, its intent to destroy the public character of lakes navigable in fact must, to be effective, be expressed in plain and unambiguous language and not be left to doubtful inference.
2. Sec. 1607*a*, Stats. (1898), providing that lakes which have been meandered and returned as navigable by the government surveyors, and also those which have been meandered and are navigable in fact, are declared to be navigable and public waters, is not to be construed as a declaration that nonmeandered lakes are nonnavigable.
3. A nonmeandered lake or pond, if navigable in fact, is a navigable and public body of water.
4. The navigability of a nonmeandered lake is in every instance a question of fact to be determined from the evidence in each particular case.

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

This proceeding was brought under our drainage statutes, ch. 419, Laws of 1905, as amended by ch. 646, Laws of 1907. The scheme comprehended the draining of a body of water known as Island Lake in the town of Rutland in Dane county. Remonstrances against the proposed action were filed by the respondents, and the circuit court held that Island Lake was a navigable body of water and could not therefore be interfered with under the drainage laws. The petitioner appeals from the order of the circuit court. Briefly stated, the evidence tended to show that fifty-odd years ago Island Lake was a body of water about a mile long and three quarters of a mile wide and that its extreme depth was about twelve feet; that

there were fish in the lake at one time; that there were a number of small boats on the lake, used mostly for hunting purposes; and that the lake had a well defined shore line. Through evaporation and other causes, the volume of water has greatly decreased, so that the open water area does not exceed thirty or thirty-five acres, and the depth of the water at an ordinary stage does not exceed six and one-half feet. At high water the lake is still a mile long and three quarters of a mile wide. Outside of the open water grass and weeds have grown up and there is some floating bog. Where the open water exists the bottom is sandy and gravelly. It is conceded that skiffs and rowboats can navigate this lake, but that the only purpose for which it is navigated at the present time is hunting. The ground is marshy between the hard land and the open water, and access to such water is difficult from most points around the lake. There is no public highway leading thereto, and the lake was neither meandered nor returned as being navigable in fact by the government surveyors, and has no inlet or outlet.

For the appellant there was a brief by *Gilbert, Jackson & Ela,* and oral argument by *F. L. Gilbert* and *Emerson Ela.* They cited and commented upon the following authorities: *Delaplaine v. C. & N. W. R. Co.* 42 Wis. 214; *Boorman v. Sunnuchs,* 42 Wis. 233; *Diedrich v. N. W. U. R. Co.* 42 Wis. 248; *Mariner v. Schulte,* 13 Wis. 692; *Smith v. Youmans,* 96 Wis. 103, 70 N. W. 1115; *Ne-pee-nauk Club v. Wilson,* 96 Wis. 290, 71 N. W. 661; *Mendota Club v. Anderson,* 101 Wis. 479, 78 N. W. 185; *Pewaukee v. Savoy,* 103 Wis. 271, 79 N. W. 436; *Priewe v. Wis. S. L. & I. Co.* 103 Wis. 537, 79 N. W. 780; *McLennan v. Prentice,* 85 Wis. 427, 442–445, 55 N. W. 764; *Att'y Gen. ex rel. Askew v. Smith,* 109 Wis. 532, 85 N. W. 512; *Ill. S. Co. v. Bilot,* 109 Wis. 418, 84 N. W. 855, 85 N. W. 402; *Rossmiller v. State,* 114 Wis. 169, 89 N. W. 839; *Diana S. Club v. Lamoreux,* 114 Wis. 44, 54, 89 N. W. 880; *In re Dancy D. Dist.* 129 Wis. 129,

132, 108 N. W. 202; *In re Horicon D. Dist.* 136 Wis. 227, 116 N. W. 12; *Johnson v. Eimerman,* 140 Wis. 327, 122 N. W. 775; 1 Farnham, Waters & Water Rights, pp. 100, 101, 165, 265, 269; 18 Am. & Eng. Ency. of Law (2d ed.) 132; *Hardin v. Jordan,* 140 U. S. 371, 11 Sup. Ct. 808, 838; *Gouverneur v. Nat. Ice Co.* 134 N. Y. 355, 31 N. E. 865, 18 L. R. A. 695, and note; *Hardin v. Shedd,* 177 Ill. 123, 52 N. E. 380; sec. 1597, Stats. (1898).

For the respondents there was a brief signed by *Clancey & Loverud,* and by *Rufus B. Smith* for the respondent *Olamp Gavoille,* and oral argument by *J. M. Clancey.* They cited *Whisler v. Wilkinson,* 22 Wis. 572; *Sellers v. Union L. Co.* 39 Wis. 525; *A. C. Conn Co. v. Little Suamico L. Mfg. Co.* 74 Wis. 652, 665, 43 N. W. 367; *Olson v. Merrill,* 42 Wis. 203; *Falls Mfg. Co. v. Oconto River Imp. Co.* 87 Wis. 134, 149, 58 N. W. 257; *Willow River Club v. Wade,* 100 Wis. 86, 76 N. W. 273; *In re Horicon D. Dist.* 136 Wis. 227, 116 N. W. 12; *Johnson v. Eimerman,* 140 Wis. 327, 122 N. W. 775; *Diedrich v. N. W. U. R. Co.* 42 Wis. 248, 263; *Walker v. Board of Public Works,* 16 Ohio, 540; 29 Cyc. 293; *Leihy v. Ashland L. Co.* 49 Wis. 165, 5 N. W. 471; *Ill. S. Co. v. Bilot,* 109 Wis. 418, 426, 84 N. W. 855, 85 N. W. 402; *Nepee-nauk Club v. Wilson,* 96 Wis. 290, 295, 71 N. W. 661.

BARNES, J. Sec. 1607*a,* Stats. (1898), provides that lakes which have been meandered and returned as navigable by the government surveyors, and also those which have been meandered and are navigable in fact, are declared to be navigable and public waters. Appellant contends that the maxim *enumeratio unius est exclusio alterius* should apply to this section, and that we have in effect a legislative declaration that nonmeandered lakes are neither navigable nor public waters. The power of the legislature to make such a declaration is, to say the least, a matter of grave doubt. *Priewe v. Wis. S. L. & I. Co.* 93 Wis. 534, 67 N. W. 918; *In re Horicon D. Dist.*

136 Wis. 227, 116 N. W. 12; *In re Dancy D. Dist.* 129 Wis. 129, 108 N. W. 202. This court has said that if the legislature has power in any case to authorize commissioners in drainage proceedings to appropriate or impair navigable waters, "the authority must be conferred in the most plain and unambiguous terms." *In re Horicon D. Dist.* 136 Wis. 227, 234, 116 N. W. 12; *Winchell v. Waukesha,* 110 Wis. 101, 108, 85 N. W. 668. By analogy, it should be said that any intent on the part of the legislature to destroy the public character of lakes navigable in fact must be expressed in plain and unambiguous language and not be left to doubtful inference. It is altogether improbable that the legislature intended to declare nonmeandered lakes nonnavigable. What is now sec. 1607*a* was first enacted as ch. 328, Laws of 1895.

Sec. 1607, Stats. (1898), provides: "The following rivers, having been heretofore so declared by acts of the legislature, are hereby declared to be navigable to the extent thereof, stated respectively, as follows." Then follows an enumeration of twenty-two streams, coupled with a description of the portions of each declared navigable. It would not be claimed that the effect of this statute was to declare all streams not therein named nonnavigable, and neither could it be successfully contended that the effect thereof was to determine that all of the streams named in said section were nonnavigable except as to the portions declared to be navigable. This court has held in a long line of cases that any watercourse which is navigable in fact is a navigable stream, regardless of the fact that it is not meandered or declared to be navigable by legislative action. *Whisler v. Wilkinson,* 22 Wis. 572; *Sellers v. Union L. Co.* 39 Wis. 525; *A. C. Conn Co. v. Little Suamico L. Mfg. Co.* 74 Wis. 652, 655, 43 N. W. 367; *Falls Mfg. Co. v. Oconto River Imp. Co.* 87 Wis. 134, 149, 58 N. W. 257; *Willow River Club v. Wade,* 100 Wis. 86, 76 N. W. 273; *Diedrich v. N. W. U. R. Co.* 42 Wis. 248, 263; *In re Horicon*

D. Dist. 136 Wis. 227, 116 N. W. 12; *Johnson v. Eimerman,* 140 Wis. 327, 122 N. W. 775.

Sec. 1607 was incorporated in the Revision of 1878 and was a codification of a large number of independent statutes. We must presume that the legislature was advised of the decisions of this court defining what were navigable waters, after sec. 1607 was enacted, and that it did not anticipate that any construction would be placed on sec. 1607*a* different from that which had in effect been placed on sec. 1607. These statutes would seem to be *in pari materia,* and if sec. 1607 is construed as not excluding everything that is not included, sec. 1607*a* should be construed likewise. We have had a number of decisions dealing with the navigability of inland lakes, and the same test has been applied as in the case of streams—that of navigability in fact. *Priewe v. Wis. S. L. & I. Co.* 93 Wis. 534, 67 N. W. 918; *S. C.* 103 Wis. 537, 79 N. W. 780; *Ill. S. Co. v. Bilot,* 109 Wis. 418, 426, 84 N. W. 855, 85 N. W. 402.

It is true that in these cases the lakes involved were meandered, but no great significance was attached to this fact, and it is difficult to see wherein it was of much significance, at least before the passage of sec. 1607*a*. In *Johnson v. Eimerman, supra,* the pond over which the controversy arose was created by damming a nonnavigable and nonmeandered creek, and it was held that the pond so created was a navigable body of water. So, too, a pond created by a dam placed in the Rock river was held navigable though not meandered. *In re Horicon D. Dist., supra.* In each of these cases it was said that the artificial condition existed for such a length of time that in a legal sense it became a natural condition. So, in these two cases decided since the enactment of sec. 1607*a,* the court has held that a nonmeandered lake or pond, if navigable in fact, is a navigable and public body of water. Whether a law is wise or unwise does not concern this court

any more than it does a private individual, so long as it is constitutional. But the legislature has made no affirmative declaration in sec. 1607*a* that all nonmeandered lakes are nonnavigable, and in determining whether or not the legislature intended that the act should be so construed we may consider the consequences which would flow from the construction adopted. In a case of doubt or ambiguity we should be slow to adopt a construction whereby we found that the legislature intended to surrender valuable public rights, assuming that it had power to do so. It may be said to be a matter of common knowledge that many insignificant bodies of water have been meandered, while other much larger and more important ones have not been. In a timbered country a lake of considerable size that did not come reasonably near to the exterior boundary lines of a section might entirely escape the observation of a government surveyor, and it is not probable that the legislature intended to place such implicit reliance on the judgment, whim, or caprice of such an employee as to make it the basis of depriving the public of the benefit of lakes navigable in fact, if the surveyor for any reason concluded that they should not be meandered. For the reasons stated we conclude that the fact that a lake is not meandered does not render it *ipso facto* nonnavigable. Its navigability in every instance is a question of fact to be determined from the evidence in each particular case. The evidence in this case is sufficient to sustain the finding of the circuit judge. Counsel for appellant practically concede this to be true if their construction of sec. 1607*a* is rejected.

By the Court.—Order affirmed.

BURGESS, Appellant, vs. DANE COUNTY, Respondent.

February 2—February 20, 1912.

Counties: Resolutions of county board: Construction: Register of deeds: Change from fee to salary system: Temporary change not lawful: Action at adjourned meeting: Fixing salaries: Separate resolution unnecessary: Special statutes: Continuance of salaries until changed: Increasing duties of office: Extra compensation.

1. In construing a resolution of a county board changing the method of compensation of the register of deeds from the fee to a salary system, it will be presumed the board acted in good faith and intended to accomplish a lawful result, and if the language employed is susceptible of two meanings, only one of which will give validity to the resolution, that one will be adopted.
2. Under ch. 410, Laws of 1901 (sec. 764*b*, Stats.), a county board has no power to provide for a temporary change in the method of compensating the register of deeds, and if a lawful change is once effected it is permanent.
3. The power given by that statute to place the office of register of deeds upon a salary basis may lawfully be exercised by the county board at an adjourned meeting.
4. The resolutions of minor deliberative bodies, such as county boards, should receive a liberal construction to effectuate their evident intent.
5. If necessary to harmonize the language used with the evident intent and purpose of such a resolution and to effect a valid result, its phrases may be transposed.
6. A county board at an adjourned meeting held in January, 1902, adopted a resolution which, after reciting the substance of ch. 410, Laws of 1901, proceeded: "Therefore it is resolved that the method of compensating the register of deeds for D. county to be elected during the ensuing year, to wit, the year 1902, his deputies, clerks, and copyists, be and the same is hereby changed from fees now provided by law to salaries, and the salary of the said register of deeds be and the same is hereby fixed at the sum of $1,800." *Held*, that the reference therein to the "ensuing year" and "the year 1902" was intended merely to mark the *inception* of the adopted change, and not to limit it in operation to the term of office of the register to be elected in that year.

7. The provision in ch. 410, Laws of 1901, that if a county board adopts the changed method of compensation it shall *at the same time* fix the amounts of the salaries to be paid to the register of deeds to be elected during the ensuing year, his deputies, clerks, and copyists, does not require separate resolutions, one providing for the change of system and the other fixing the salaries. *State ex rel. Williams v. Sawyer Co.* 140 Wis. 634, distinguished.
8. Ch. 410, Laws of 1901 (sec. 764*b*, Stats.), so far as it relates to the compensation of the register of deeds, is not a special statute so as to preclude the application to that office, after the salary method has been adopted, of sec. 694, Stats. (1898), which continues salaries fixed by the county board until changed by the same authority.
9. The duties of a public office may, within reasonable limits, be increased without giving the incumbent a right to extra compensation.
10. The provision of said ch. 410, Laws of 1901, that the salaries paid under it "shall be in lieu of all fees, per diem and compensation for services rendered," precludes the recovery of any additional compensation for services germane to the office, such as the filing and indexing of vital statistics, discontinued from 1907 to 1909, but revived by ch. 188, Laws of 1909.

APPEAL from an order of the circuit court for Dane county: E. C. HIGBEE, Judge. *Affirmed.*

This is an action to recover fees turned over by the plaintiff to the defendant while he was its register of deeds, and to recover from it fees due for services rendered as such register of deeds. A claim against the county was filed by the plaintiff, and from a disallowance thereof by the county board he appealed to the circuit court for *Dane County.* His claim, embodied in a complaint, is as follows:

"Now comes *S. T. Burgess* and hereby makes claim against said *Dane County* of the state of Wisconsin, and in support of said claim respectfully sets forth and shows as follows:

"That he was duly elected to the office of register of deeds of said *Dane County,* Wisconsin, at the general election held in the month of November in the year 1906, and that thereafter on the 7th day of January, 1907, he duly qualified and assumed the duties of said office of register of deeds and con-

tinued to discharge the duties thereof under said election of the year 1906 until the 2d day of January, 1909; that he was likewise duly elected to said office at the general election held in the month of November in the year 1908, and on the said 2d day of January, 1909, succeeded himself as such register of deeds and did then and there duly qualify and assume the duties of said office; that from and since the 7th day of January, 1907, and continuously to the date hereof, he has been and still is duly elected and qualified register of deeds as aforesaid and has throughout said period discharged and still is discharging the duties of said office.

"That from and since the 7th day of January, 1907, and until the 31st day of March, 1910, he has collected as such register of deeds fees for filing and recording instruments in the said office of register of deeds in the amount of $18,339.05, which said fees in the said amount of $18,339.05 he has paid over to the treasurer of *Dane County,* Wisconsin, and did so pay over to the said treasurer and into the treasury of said county on or before the said 31st day of March, 1910, and since the said 7th day of January, 1907, the said sum of fees as above set forth.

"Claimant further says that the said fees were the property of and belong to this claimant and that they still are the property of and belong to this claimant, and that he is entitled to the same, and that he hereby makes claim against said *Dane County* for the amount thereof, and attaches hereto and makes as a part of this claim an itemized statement marked Exhibit No. 1 setting forth the date and amount of each payment of such fees by him to the said treasurer.

"Claimant further says that he has received from said county no consideration or equivalent whatever for the money so paid over to *Dane County* or for any part thereof.

"And this claimant further says that at the date of each of said payments and throughout his term of office until after the 31st day of March, 1910, that this claimant was led to believe and did believe that the title to said fees was in *Dane County* and that this claimant was only entitled to receive a salary instead of said fees, and that each and all said payments were made on said mistaken belief and information; that on or about the 27th day of April, 1910, for the first time he was informed of the fact that the title to said fees

was in this claimant and not in said *Dane County;* that at the time of each and all of said payments and until on or about the 27th day of April, 1910, this claimant was led to believe and did believe in fact that the county board of *Dane County* had taken proper action fixing his said compensation as such officer on the basis of salary instead of on the basis of fees, whereas in truth and in fact said county board had taken no action whatever pertaining to or affecting claimant's right to said fees as the compensation of said office. And claimant did not know in fact at any of said dates of payment nor until on or about the 27th day of April, 1910, that said county board had taken no action whatever affecting in any way the rights of this claimant in and to said fees. That this claimant paid said money to said county under the mistaken belief that the same was due to said *Dane County,* and under the further mistaken belief that as such register of deeds he was bound to pay the same; and claimant further says that in fact, at each and all of the times of payment hereinbefore set forth, he was under no obligation to pay the said moneys or any part thereof to said *Dane County,* and that said *Dane County* had no right to receive the same or any part thereof, and that said *Dane County* has no right to retain the same or any part thereof, as this claimant is now informed and verily believes; that on or about said 27th day of April, 1910, for the first time during the entire period covered by this claim, or at all, this claimant was informed that the *Dane County* board of supervisors had not in fact changed the system of compensation of the register of deeds for or during any part of the said two terms of office of this claimant, and that the only pretended claim of said *Dane County* to said fees was based upon a certain resolution adopted by said county board of supervisors at its annual meeting for the year 1901 and on the 24th day of January, 1902, in the said annual session of said county board, a copy of which said resolution on which said pretended claim of said *Dane County* to said fees was based is hereto attached, marked Exhibit No. 2, and made a part of this claim; and this claimant further says that from and since the said 27th day of April, 1910, this claimant has continuously asserted his right and title to and still claims and asserts his title to the said fees so paid over to said *Dane County* and to each and all of said fees in the amount hereinbefore set forth.

"Claimant further says that between the said 7th day of January, 1907, and the date hereof the said *Dane County* had paid out to this claimant and to assistants of this claimant items which are properly chargeable to this claimant against his said claim in the amount of $11,800, as this claimant verily believes; that all of such sums as were paid to this claimant personally were paid to him upon vouchers issued to him by the clerk of said county, which said vouchers were receipted for to said clerk upon stubs, a copy of the form of which said stubs is hereto attached and marked Exhibit No. 3 and a copy of which said vouchers is hereto attached and marked Exhibit No. 4, both of which said exhibits are hereby referred to and made a part of this claim; that said *Dane County* has also paid out certain other sums for postage since the said 7th day of January, 1907, and prior to the date hereof, which are properly chargeable to this claimant against his said claim hereinbefore set forth in the amount, as this claimant verily believes, of not to exceed $350.

"This claimant further alleges as a further and separate claim against the said county that during the term of his office, to wit, since the 7th day of January, 1907, and prior to October 1, 1907, he has filed and indexed marriage, birth, accident, and death certificates, as required by law, to the number of 4,758 such certificates, for each of which certificates filed and indexed by him prior to the 1st day of October, 1907, he makes claim against said *Dane County* in the sum of twenty-five cents; that he has also similarly filed and indexed since the 2d day of January, 1909, and prior to the date thereof, certain other marriage, birth, and death certificates as required by law, being marriage, birth, and death certificates filed with him by the state and local registrars of vital statistics, in the total number of 640 such certificates, for each of which he hereby makes claim against said *Dane County* in the sum of ten cents. That his accounts and claims against *Dane County* are as follows, to wit:

Fees received by him as register of deeds and belonging to him as register of deeds paid into the treasury of *Dane County* between the 7th day of January, 1907, and the 31st day of March, 1910, as hereinbefore set forth in the amount of.....	$18,339 05
Filed and indexed 4,758 birth, death, accident, and marriage certificates prior to October 1, 1907, at 25 cents each	1,189 50

Filed and indexed 640 birth, death, and marriage certificates received from local and state registrars of vital statistics at 10 cents each	64 00
Total	$19,612 55
Against which there should be credited to *Dane County* items as hereinbefore set forth in the total amount of	12,150 00
Balance due and owing to this claimant over and above all offsets	$7,462 55

"Claimant further says that no part of said claim has been paid.

"Wherefore said *S. T. Burgess* makes claim against said *Dane County* for the sum of $7,462.55."

Exhibit 1 contains a list of payments of fees by the plaintiff to *Dane County* from March 30, 1907, to March 31, 1910, inclusive. Exhibits 3 and 4 show that the payments to plaintiff were made for salary. Exhibit 2 is as follows:

"Whereas, by chapter 410, Laws of 1901, the county board of any county in this state may by resolution change the method of compensating the register of deeds, his deputies, clerks, and copyists, from fees now provided by law to salaries, and may fix the amount of the salaries paid the register of deeds thereafter elected, his deputies, clerks, and copyists: therefore it is resolved that the method of compensating the register of deeds for *Dane County* to be elected during the ensuing year, to wit, the year of 1902, his deputies, clerks, and copyists, be and the same is hereby changed from fees now provided by law to salaries and the salary of the said register of deeds be and the same is hereby fixed at the sum of $1,800 per annum; that the said register of deeds shall be allowed one deputy to be appointed by said register of deeds and paid by the county, and that the salary so paid to such deputy shall be in the amount of $900 per annum, payable monthly, and two copyists appointed by the said register of deeds and paid by the county, and that the sum so paid to such copyists shall be in the amount of $400 per annum for the first copyist and $300 for the second copyist, both payable monthly; that all fees, per diem, and all other emoluments of whatever kind, received by said register of deeds, his deputies, clerks, and copyists, shall at the end of each quarter be paid

into the county treasurer's office and his accounts audited in the manner provided by law."

The defendant demurred as follows:

"And now comes the defendant, by Vroman Mason, district attorney for said *Dane County,* defendant's attorney, and demurs to the complaint herein on the ground that it appears on the face of said complaint that the same does not state facts sufficient to constitute a cause of action, and on the further ground that it appears on the face of said complaint that the plaintiff has not legal capacity to sue, in this, that the statement of plaintiff's claim filed in the office of the county clerk of said county, which said claim is the basis of this action, did not set forth the various items of said claim with sufficient accuracy as required by section No. 677 of the Wisconsin Statutes of 1898 and acts amendatory thereof and supplementary thereto, and that said statement of plaintiff's claim was not verified as required by said section with sufficient accuracy and positiveness."

From an order sustaining the demurrer the plaintiff appealed.

For the appellant there was a brief by *Gilbert, Jackson & Ela,* and oral argument by *Emerson Ela* and *F. L. Gilbert.*

R. N. Nelson, district attorney, and *Vroman Mason* and *J. M. Clancey,* for the respondent.

VINJE, J. The trial court sustained the demurrer on the ground that the complaint did not state facts sufficient to constitute a cause of action. It held that the resolution adopted by the county board in 1902 was sufficient to change the method of compensating the registers of deeds thereafter elected, from the fee to the salary system, as authorized by sec. 764*b,* Stats. (Supp. 1906: Laws of 1901, ch. 410). Plaintiff claims the resolution was insufficient to effect such a change, for two reasons: first, because the duration of such change was by the language of the resolution limited to the term of the register of deeds to be elected in 1902; and second, because it required two resolutions to complete the change,

one providing for a salary in lieu of fees and, after its passage, a separate one fixing the salary of the register of deeds to be elected during the ensuing year.

It is evident from the preamble of the resolution that the county board intended to act pursuant to the provisions of ch. 410, Laws of 1901, now sec. 764*b*, Stats. It will be presumed the board acted in good faith and intended to accomplish a valid and lawful result. *State v. Eau Claire,* 40 Wis. 533. Hence, if the language employed is susceptible of two constructions, one rendering the resolution void and the other valid, that construction which saves it will be adopted. *Nichols v. Halliday,* 27 Wis. 406; *Att'y Gen. v. Eau Claire,* 37 Wis. 400, 438; *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460. The preamble and opening sentence of the resolution read as follows:

"Whereas, by chapter 410, Laws of 1901, the county board of any county in this state may by resolution change the method of compensating the register of deeds, his deputies, clerks, and copyists, from fees now provided by law to salaries, and fix the amount of the salaries paid the register of deeds thereafter elected, his deputies, clerks, and copyists: therefore it is resolved that the method of compensating the register of deeds for *Dane County* to be elected during the ensuing year, to wit, the year 1902, his deputies, clerks, and copyists, be and the same is hereby changed from fees now provided by law to salaries."

It is contended by plaintiff that the phrase "to be elected during the ensuing year, to wit, the year 1902," limits the duration of the intended change to the term of the register of deeds elected in 1902, and that such a limitation rendered the resolution void. Unquestionably the board had no power to provide for a temporary change. If a lawful change was effected it was a permanent one. *Northern T. Co. v. Snyder,* 113 Wis. 516, 89 N. W. 460; *State ex rel. Williams v. Sawyer Co.* 140 Wis. 634, 641, 123 N. W. 248. It must be conceded that the language of the resolution will bear the con-

struction contended for by plaintiff. But we think the phrase, "to be elected during the ensuing year, to wit, the year 1902," can be construed to mark the commencement and not the duration of the change; that is, to mean only that the change is to take effect with the commencement of the term of the register of deeds to be elected in 1902. It appears from the record that the resolution was passed by the county board at an adjourned session of the annual meeting of 1901 held in January, 1902. That explains why the words "to wit, the year 1902," were added after the words of the statute, "the ensuing year." It became necessary to provide that the change should begin with the term of the register of deeds to be elected in the fall of 1902, which was not the "ensuing year" when the adjourned session was held. That the county board could lawfully exercise such power at an adjourned meeting was decided in *Douglas Co. v. Sommer,* 120 Wis. 424, 98 N. W. 249. It is possible that the necessity of making a slight departure from the statutory language was responsible for the phrase in a position rendering it capable of two constructions. However, be that as it may, we conceive it to be no violence to language to say that the board intended the phrase quoted to mark the inception of the adopted change. Such construction harmonizes the resolution and makes it effectuate the purpose it was manifestly intended to subserve, namely, to provide a salary in lieu of fees for the register of deeds elected in the year 1902 and for all registers of deeds thereafter elected. It is true that where there is no ambiguity or doubt as to the meaning of the language used there is no room for construction, and that the court must give effect to the plain intent and language of a writing no matter what the result may be. But when the intent is clear, and the language used is fairly susceptible of effectuating that intent, then it should be construed to do so even if it will bear another meaning—especially when such other meaning would render the whole writing nugatory. The question for consideration

before the county board was that of changing the method of compensating the register of deeds and his deputies from fees to salaries pursuant to the provisions of sec. 764*b*, Stats. Presumably the board intended to comply with the provisions thereof and to make the change as the statute required. Such presumption must prevail unless the language used is wholly inconsistent therewith. In the case of minor deliberative bodies such as county boards, the language of their resolutions will receive a liberal construction in order to effectuate their evident intent. No technical grammatical interpretation will control. *Hark v. Gladwell,* 49 Wis. 172, 5 N. W. 323; *Wis. Cent. R. Co. v. Ashland Co.* 81 Wis. 1, 13, 50 N. W. 937.

The trial court transposed the phrase, "to be elected during the ensuing year, to wit, the year 1902," to follow the words "register of deeds," a couple of lines below, making the resolution read: "Resolved, that the method of compensating the register of deeds for *Dane County,* his deputies, clerks, and copyists, be and the same is hereby changed from fees now provided by law to salaries, and the salary of said register of deeds to be elected during the ensuing year, to wit, the year 1902, be and the same is hereby fixed," etc. Judicial authority is not wanting to sustain such transposition. Indeed, greater changes in, and additions to, enactments or writings have been made in order to carry out their evident intent. Thus in the case of *Nichols v. Halliday,* 27 Wis. 406, the words "with respect to the baggage and effects of their guests" were entirely supplied by the court. In *Palms v. Shawano Co.* 61 Wis. 211, 21 N. W. 77, the word *north* in a legislative act was substituted for the word *south.* In *Wis. Ind. School v. Clark Co.* 103 Wis. 651, 79 N. W. 422, words not in the Revision of 1878 were supplied from the repealed statute of 1875. In *State ex rel. McGrael v. Phelps,* 144 Wis. 1, 128 N. W. 1041, the equivalent of the phrase, "of the vote of the state, county or district in which such person is a candidate,"

was held to be implied though not expressed in the act construed. And in *Neacy v. Milwaukee Co.* 144 Wis. 210, 128 N. W. 1063, as expressed by Justice MARSHALL in the *McGrael Case,* "a word expressing an idea, very obscurely, considering its location, was expanded by the addition of other words, the whole then transferred to its proper location as a qualifying clause, and another clause was transposed to its proper location, so that the collection of words which, read literally, was senseless, was made to serve the purpose intended." The subject as to the extent to which judicial construction may go to carry out the evident intent of a legislative act, or the resolution of a deliberative body such as a county board, has been so fully treated in the recent cases of *State ex rel. McGrael v. Phelps, supra; Neacy v. Milwaukee Co., supra;* and *State ex rel. Minneapolis, St. P. & S. S. M. R. Co. v. Railroad Comm.* 137 Wis. 80, 117 N. W. 846, that no further discussion thereof is now deemed necessary.

It is also contended that two separate resolutions were necessary to successfully inaugurate the change, one providing for a salary in lieu of fees and another fixing the salary. The case of *State ex rel. Williams v. Sawyer Co.* 140 Wis. 634, 123 N. W. 248, is relied upon to sustain this contention. The act then construed was ch. 651, Laws of 1907, now secs. 2523—1 to 2523—21, Stats. The first section thereof created in each county of the state one or more courts, as might be provided for, to be known and designated as special municipal courts. The second section read: "The county board of supervisors of any county may, by a majority of all members elect, adopt the provisions of this act by resolution and upon such adoption may thereafter, in like manner and upon a like vote, provide for a special municipal court or courts," etc. This court held that the act clearly contemplated the passage of two separate resolutions, one adopting the provisions of the act, and thereafter another providing for the court established. Such ruling was in conformity with the plain

language of the statute then under consideration. The section now before us (sec. 764*b*, Stats.) provides that the county board of any county "may at their annual meeting preceding the election of county officers, by resolution, change the method of compensating the register of deeds, his deputies, clerks and copyists, from fees, now provided by law, to salaries, and shall *at the same time* fix the amounts of the salaries to be paid the register of deeds to be elected during the ensuing year, his deputies, clerks and copyists, and the number thereof to be appointed by the register of deeds, and paid by the county." Not only are there no words in the statute suggesting, much less requiring, separate resolutions, but, on the contrary, the language seems to imply that only one resolution should be passed. The statute says the county board may "by resolution" change from fees to salary, and shall *at the same time* fix the amount of the salaries to be paid. True, this does not necessarily mean that the adoption of the change and the fixing of the salaries must be by one resolution, but it clearly does not say that it must be by two, as did ch. 651, Laws of 1907. In the absence of specific legislative direction it must be held that it was optional with the county board to embody both provisions in one resolution or to vote on them separately, provided both were passed at the same meeting.

The further claim is made that, even though the resolution passed in 1902 was sufficient to accomplish a change from a fee to a salary system, yet, inasmuch as the county board subsequently never fixed the salary of the register of deeds as provided for in sec. 764*b*, Stats., the plaintiff was entitled to fees as prescribed by sec. 764, Stats. (1898), and not to a salary. If this claim is correct, then any failure on the part of the county board to fix a salary as required would *ipso facto* operate as a return to the fee system. The county board by a failure to comply with the law would accomplish what this court held in the case of *Northern T. Co. v. Snyder*, 113 Wis. 516, 89 N. W. 460, it could not do by express resolution, namely, change back from the salary to the fee system.

That such a result was not contemplated nor permitted is made evident by a reference to sec. 694, Stats. (1898), which provides:

"The county board at their annual meeting shall fix the amount of salary which shall be received by every county officer, including county judge, who is to be elected in the county during the ensuing year and is entitled to receive a salary payable out of the county treasury, and the salary so fixed shall not be increased or diminished during his term of office. Such salaries shall be paid at the end of each month. All salaries, the amounts whereof have heretofore been fixed by such board or established by law, shall be and remain the salaries of such officers until the county board shall fix the amounts thereof in accordance with this section, and when such amounts are once so fixed they shall be and remain the salaries of such officers until changed by the county board."

Sec. 764*b* says: "And the county board of such county shall, thereafter, at their annual meeting preceding the election of the register of deeds fix the amounts of the salaries of the register of deeds to be elected and his deputies, clerks and copyists and the number thereof for the term." Plaintiff argues that this latter enactment is a special statute and that sec. 694, Stats. (1898), has no reference to the salary of the register of deeds fixed pursuant to its provisions. We cannot so regard it. Sec. 764*b* is no more a special statute than was 694*a*, Stats., relating to the fixing of the sheriff's salary. And it was held in *Northern T. Co. v. Snyder,* 113 Wis. 516, 554, 89 N. W. 460, that the salary of the sheriff once having been fixed by the county board, and not thereafter changed, at a time when the board had power to do so, it remained as fixed. The same is true as to the salary of a register of deeds. Sec. 694 steps in and justly and beneficently relieves a county officer from taking an officer *cum onere* and without a salary where the county board has negligently or otherwise failed to comply with the law relative to the fixing of salaries.

It appears that from October 1, 1907, to October 1, 1909, registers of deeds were relieved by ch. 469, Laws of 1907,

from filing certain vital statistics, and that plaintiff, who was re-elected in 1908, was after October 1, 1909, required by the provisions of ch. 188, Laws of 1909, to file and index such vital statistics. Were plaintiff entitled to fees for such work, the same would amount to $64. It is claimed that, even if plaintiff was on a salary, he should be allowed fees for such extra work. The claim is not well taken. The duties germane to a public office may, within reasonable limits, be increased without giving the incumbent thereof a right to extra compensation. *St. Croix Co. v. Webster,* 111 Wis. 270, 87 N. W. 302; *Barron Co. v. Beckwith,* 142 Wis. 519, 124 N. W. 1030. The duties plaintiff was required to perform were such as had for years been performed by registers of deeds, with the exception of the interval between October 1, 1907, and October 1, 1909. Sec. 764*b,* Stats., provides: "The salaries of the register of deeds, his deputies, clerks and copyists so paid, shall be in lieu of all fees, per diem and compensation for services rendered by them." Language as broad and explicit as this leaves no room for argument that both salary and fees may be recovered even though the services be extra or additional, provided they are germane to the duties of the office. In this case they were not only germane to the office but had customarily been performed by the incumbents thereof.

The decision reached upon the questions discussed renders it unnecessary to consider the other questions raised by plaintiff's counsel. In passing it may not be amiss to observe that plaintiff was elected with the expectation of receiving a salary; that he accepted such salary for one term; was re-elected with the understanding that he was to receive a salary for the next term, and did receive it. He seemed satisfied with the situation till April, 1910, when he claims he discovered that he was entitled to fees instead of a salary. The discontent began with the discovery. "Where ignorance is bliss 'tis folly to be wise."

By the Court.—Order affirmed.

HARRIS and another, Appellants, vs. WELCH and others, Respondents.

February 2—February 20, 1912.

Abatement and revival: What causes of action survive: Deceit: Application to revive: Special proceeding: Practice: Discharge of executors: Laches: Appeal: Former decision: Conclusiveness: Review: Discretionary matters: Affirmance and reversal.

1. A proceeding to revive an action is a special proceeding, not one in an action, and the entitling thereof as in the action, and suggestions in the moving papers in harmony therewith, are mere informalities which will be disregarded as immaterial.
2. The fact that pending an appeal from an order refusing to revive an action against the personal representative of a deceased defendant, such representative settled his accounts and was in form discharged by the county court, does not oust this court of jurisdiction to hear the appeal, and it will not be dismissed on that ground.
3. A decision in an action brought by plaintiffs as assignees of a contract, that such action was one for deceit, is binding upon them in a subsequent action based upon substantially the same facts.
4. Since the enactment of ch. 353, Laws of 1907, a cause of action for deceit survives the death of the party originally liable.
5. Upon an appeal in a matter wherein the trial court failed to exercise its discretion because of an erroneous view of the law, the decision will be affirmed if right, however untenable the ground upon which it was rendered. BARNES and SIEBECKER, JJ., dissent.
6. To justify an affirmance in such case it is not necessary to determine that a contrary decision by the trial court would have been an abuse of discretion. If the right of the matter is clear, this court will act upon the preponderating probability that the trial court would have decided accordingly if it had passed upon the vital questions involved. BARNES and SIEBECKER, JJ., dissent.
7. An application to revive an action for deceit was properly denied where it appeared that, upon the trial of a previous action for substantially the same cause, plaintiffs' counsel admitted that the matters complained of had been settled by acts of the parties before suit, but was allowed to discontinue the action without prejudice, against defendants' objection; that the subse-

quent action was not commenced until the alleged cause was nearly six years old; that plaintiffs delayed closing the first suit by judgment, and defendants had been put to great expense and forced to take two appeals to the supreme court to secure a proper judgment therein; and that in the interval the relations of the parties had changed and several had died.

APPEAL from an order of the circuit court for Waukesha county: MARTIN L. LUECK, Circuit Judge. *Affirmed.*

In 1906, an action was brought by plaintiffs and John H. Harris against Charles A. Welch and the *White Rock Mineral Spring Company* for damages claimed to have been caused by Welch having made, in his own behalf and in behalf of the *Spring Company* and its stockholders, false and fraudulent representations. The claim, in general, was that in February, 1903, Welch, in his own behalf and that of his associates and company, by false representations, in writing, as to the business and property of said company, induced *E. R. Estberg,* his associates and assigns, to undertake, for a time, as exclusive agents, to sell the property of the company and its corporate stock. Later, an interest in such agency contract was assigned to each of several other persons, including plaintiffs. Relying on such false representations such assignee and assignors expended large sums of money in carrying out such agreement, resulting in an executory contract of sale. The executory vendee relied on the false statement made to the original agents. Later, such vendee discovered the truth, refused to perform, and canceled the contract, to plaintiffs' damage in the sum named.

Welch and the *White Rock Mineral Spring Company* answered, putting in issue the allegations of fraud, denying that plaintiffs or their associates were contracted with as sales agents, alleging that they were dealt with under an option as prospective purchasers, and, in addition to other defenses, pleading that after the happening of the events claimed by plaintiffs to have occurred, and the expiration of the option to purchase, because of the option holders, including plaintiffs,

having, in good faith, expended time, labor, and money to acquire the property, and for a full settlement of all claims of every kind and nature growing out of the previous transactions, a second option to acquire the property was given the parties, which was accepted and held till it expired without their choosing to take the fruits thereof.

After the action had been pending for some over two years it was brought on to be heard and the trial commenced. After some evidence was taken, plaintiffs' attorney said to the court that he was satisfied of the truth of the allegations respecting a second option, and that it precluded recovering for anything which occurred as to the first. For that reason plaintiffs asked leave to discontinue. Defendants opposed the motion, insisting upon a dismissal upon the merits. Nevertheless the motion was granted, but the case was not finally closed by judgment till over a year thereafter.

Pending such final closing, and just within the limitation period fixed by the statute, this action was commenced by substantially the same plaintiffs against the same defendants to recover the same damages sought to be recovered before and upon the same ground; except that what was before denominated an agency contract was said to be an option to purchase, as alleged by defendants in their first answer, and that the false statement was given to plaintiffs' assignors for the purpose of inducing them and others to enter into the transaction; that all were so induced; that relying thereon plaintiffs contracted to sell the property to others,—who also relied thereon, all to the knowledge of Welch, he actually participating in making the contract and organizing a company to carry it out in the interest of the executory purchasers; that before the time arrived for final consummation of the transaction, the falsity of the representations was discovered, resulting in the whole matter failing, to the loss of plaintiffs in money and labor expended, and otherwise in the sum for which judgment was claimed.

The defendants Welch and the *White Rock Mineral Spring Company* answered, among other things, by putting in issue the allegations of fraud and pleading the second option, as before. January 18, 1910,—after issue joined, the first action was finally closed, so far as the trial court was concerned, by a judgment of discontinuance with costs in favor of defendants, judgment being entered upon application of plaintiffs, and defendants still demanding a judgment upon the merits.

Upon the order granting the motion for leave to discontinue being entered, defendants appealed, to test the question of whether they should not have judgment as demanded. The appeal was dismissed because the order was not appealable. 141 Wis. 304, 124 N. W. 406. In due time the case was closed by judgment and a second appeal taken to this court. 144 Wis. 506, 129 N. W. 525. Pending that, Mr. Welch died and a personal representative was substituted in his place. The judgment was reversed and the cause remanded for dismissal upon the merits because the action was for damages for deceit, alleged to have been practiced upon plaintiffs' assignors; that the cause of action, if there were one, accrued to such assignors and, being for deceit, did not pass to any extent, to plaintiffs by a mere assignment of an interest in the contract; moreover, that the plea of a second option having been given in settlement of all claims on account of anything which occurred in or about the first, was a good defense, and plaintiffs having in open court upon the trial confessed the truth of the plea and its efficiency, the trial court should have rendered judgment of dismissal upon the merits. Thereafter such judgment was rendered. Pending the final disposition of the appeal the prosecution of this action was stayed on application of defendants to await such disposition.

During the period of the stay, and after the death of Mr. Welch, in *ex parte* proceedings in plaintiffs' behalf, the cause was, in form, revived, but later, to the end that the

matter might be presented on notice and with opportunity for the personal representative to be heard, the order of revival was vacated. In the meantime, by leave of court, the final determination of the first action and grounds thereof were pleaded in bar in the second action. The death of Mr. Welch and other matters were also pleaded by way of estoppel. All such matters and others, showing some material change in the relations of the parties, were finally brought to the attention of the court on the motion to revive. Such motion, in form, was made in the action instead of outside it,—in other words, as a special proceeding.

The motion was denied, solely, upon the ground that the alleged cause of action was for damages for deceit and so, as to Mr. Welch, did not survive his death.

Pending the appeal from the foregoing the executors of the will of Mr. Welch completed their duties as such and were, in due form, discharged by the county court having jurisdiction of the matter. On such facts and the ground that the motion was improperly brought, a dismissal of the appeal was requested.

For the appellants there was a brief by *Gill, Barry & Mahoney,* and oral argument by *A. R. Barry.*

For the respondents *Margaret F. Welch* and *Charles G. Welch,* formerly executors of Charles A. Welch, there was a brief, and for the respondent *White Rock Mineral Spring Company* a separate brief, by *Doerfler, Green & Bender,* and the cause was argued orally by *Harrison S. Green* and *W. H. Bender.*

MARSHALL, J. A proceeding to revive an action, as counsel for respondent suggest, is a special proceeding, not one in an action. *Voss v. Stoll,* 141 Wis. 267, 124 N. W. 89. However, mere form is of little consequence under our system. The substantials, only, count efficiently. So here the mere entitling of the proceeding, as in the action, and sugges-

tions in the papers in harmony therewith, must be treated as immaterial and the order appealed from regarded as final in a special proceeding, disregarding all mere informalities.

The suggestion that pending the appeal the deceased has ceased to have personal representatives is also immaterial. When the motion was made there were such. The cause was once revived, even if somewhat irregularly, and the order was vacated to enable the personal representatives to be heard. The subsequent termination of their representative character on their own motion, or otherwise, after having been granted the opportunity for a hearing, does not oust the court of jurisdiction to hear the appeal. In case of the order being reversed the cause would go back for such further proceedings as might be appropriate to the case. The personal representatives at the time of the appeal, are still such as regards the matter here.

The ground upon which the order was entered denying the motion to revive is untenable. The cause of action, as the trial court held, is for deceit. That is ruled in respondent's favor by the decision in the former action. 144 Wis. 506, 129 N. W. 525. There is no difference between the two except, whereas in the first the theory was that the deceit was practiced upon plaintiffs' assignors prior to the assignment, and plaintiffs took a right to recover their loss as an incident of the assignment of an interest in the contract, the making of which was induced by fraud; in the second the theory was that the deceit was practiced upon appellants as well as upon their assignors,—upon the former through the latter, by the procurement of Welch, and thereafter by him directly.

However, the trial court was wrong in holding that a cause of action for deceit does not survive. That is true as the law existed when *John V. Farwell Co. v. Wolf,* 96 Wis. 10, 70 N. W. 289, 71 N. W. 109, was decided, but subsequently, by ch. 353, Laws of 1907, our survival statute was changed to harmonize with that of New York, doubtless for the purpose of avoiding the rule in the *Farwell Case.*

So if we are to look only to the ground upon which the motion turned below, a reversal and remand of the case for exercise by the trial court of its discretion as to whether to grant the motion, would be inevitable. It was formerly the case to do so,—to act here only by way of review of the original exercise of judicial authority. But latterly a broader conception of the letter and spirit of the Code has prevailed. The tendency in that direction is constant. That is to affirm the decision complained of, if manifestly right, however untenable may be the ground upon which it was rendered below. *Estate of Koch, post,* p. 548, 134 N. W. 663. That seems to be proper here; but not because, if the court below had decided otherwise it would have been erroneous, as an abuse of discretion. That view is not necessary to justify an affirmance here. If the right of the matter is clear, if there is such manifestly preponderating probability that the trial court would have decided accordingly and entered the order appealed from had it passed upon the real vital questions for consideration, then we may, and ought to assume, it would, in such circumstances, have so decided, and affirm such order upon the sole ground that it is right,—right regardless of the initial grounds therefor. That course tends to put a finish upon litigation when any other would often needlessly reopen matters to further contests, leading to further large private and public expenditure and waste, without any reasonable probability of reaching a more just termination of the matter.

It seems that one need but read the statement of facts to be convinced that the equities as well as the law are against the motion to revive. Many of the reasons assigned in *Allen v. Frawley,* 138 Wis. 295, 119 N. W. 565, for condemning the application to revive are significantly present in this case. The alleged cause was nearly six years old when the action was commenced. The previous one was insisted upon for over two years after defendants answered pleading the real nature of the first contract, as plaintiffs confessed in effect in the complaint in the second action, and pleading the second

contract in settlement of all differences growing out of the former transaction, which plaintiffs' counsel after long delay, evidently by fault of plaintiffs themselves,—delay till the trial was actually entered upon,—confessed was true and a perfect defense to plaintiffs' cause of action, if they ever had any. Even then they sought to keep the confessedly settled matter alive by discontinuing the action instead of having it dismissed upon the merits, doubtless because they appreciated that a judgment on the merits might be fatal to a second action on the theory of the fraud having been perpetrated upon them. They succeeded at first, as indicated in the statement,—an order of discontinuance was entered and then the second action was commenced without closing the first by judgment.

Such obstacles had to be overcome, as indicated in the statement, some of which were apparently thrown in the way by appellants for the purpose of delay, that it was some three years after the discontinuance, during which there were two appeals to this court with all the usual expenses, before the cause was finally dismissed upon the merits, as this court held it clearly should have been, promptly, upon plaintiffs' confession, through their attorneys, as before stated.

During the latter part of the long delay Mr. Welch died. The relations of others to the transaction have changed. Some of such others have died. Mr. Welch evidently acted in an agency capacity in all he did. Personal representatives of him could not, efficiently, take his place as regards those interested in his estate. The long delay, giving room for this changed situation, is largely attributable to plaintiffs. The radical shifting of position long after the commencement of the first action, putting the adversaries to the large useless expense mentioned, is a strong circumstance against the efforts to revive. By itself it might well be held an efficient estoppel in the matter.

But above all, this court held in the appeal in the first action that substantially the very matters on account of which

recovery was sought in the second, were, as before indicated, settled some two years before commencing the first. Plaintiffs themselves confessed it. Such first action was disposed of by judgment on such confession and such judgment was duly pleaded in the second action, as we have seen. That does not seem to leave the moving parties any support for their application to revive. So from any viewpoint the order denying the motion is manifestly just. Therefore, it should be affirmed and the long-drawn-out, expensive controversy brought to a final, undisturbable termination.

By the Court.—Order affirmed.

The following opinion was filed March 8, 1912:

BARNES, J. (*dissenting*). The circuit court never exercised its discretion as to whether it would permit the action to be revived. It erroneously placed its decision on the ground that the action did not survive. The law vests in the trial court a broad discretion as to when it will revive and when it will refuse to revive actions. The law vests in this court the power to say whether or not the trial court has abused that discretion. The law does not vest in this court the right to exercise the discretionary power conferred on the trial court. If this court could say that it would have been an abuse of discretion for the trial court to have ordered a revivor of the action, then it would be proper for this court to affirm the order appealed from. But it has not said so and in fact has said the contrary.

I am authorized to say that Mr. Justice SIEBECKER concurs in the foregoing.

SHOWALTER, Plaintiff in error, vs. THE STATE, Defendant in error.

February 2—February 20, 1912.

Rape: Nonconsent: Degree of resistance: Evidence: Leading questions: Instructions to jury: Appeal: Harmless errors.

1. Evidence on a trial for rape *held* sufficiently to show that the complaining witness resisted to the utmost and made every reasonable effort in her power to prevent the violation of her person.
2. Permitting the district attorney to propound leading questions to the complaining witness was not prejudicial error in this case, no objection thereto having been made by defendant's counsel and the facts covered by such questions having also been testified to by such witness in response to questions not leading in form.
3. Instructions as to the degree of resistance required to show nonconsent: "There can be no rape of a female where there is consent, no matter how reluctantly it be given. To constitute rape the connection must be against her will, and there must be the utmost reluctance and resistance on her part, or her will must be overcome by fear and terror so extreme as to preclude resistance,"—state the law correctly.

ERROR to review a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

The plaintiff in error, hereafter referred to as the defendant, was convicted on October 20, 1910, on an information charging him with having committed the crime of rape upon the person of one Mary Fraizer, the complaining witness, on the 24th day of September, 1910.

The complaining witness testified to the following effect: She was a widow sixty-five years of age at the time of the alleged assault. For a little more than a year ending in April, 1910, the defendant had boarded and during the cold weather roomed at her home. He was a horse trainer, and during the warm weather slept on the fair grounds, which were close to her home. On the night of September 23, 1910,

she was alone. It was a rainy and stormy night. At about 11 o'clock she was awakened by some one walking around the house and trying the doors and windows. She went to a window and asked who was there and the defendant gave his name, asked if she was alone, and said he wanted to get in. He was told he could not get into the house that night. The defendant persisted in trying to get in at the doors and windows and the complaining witness became frightened, went to different windows of the house, raised them, and called for help to different neighbors. The defendant then threatened to shoot her through the window if she screamed again. Presently the defendant went around the house and opened the cellar door and went down into the cellar way. While he was down in the cellar way trying the door the complaining witness had put on some clothes and thrown a shawl over her head. She opened the front door and went out, locking the door after her. She ran over to the kitchen door of a neighbor's house, rapped upon it and called the name of the neighbor, but no one came to let her in. While she was at the door she heard some one walking or running, and on looking around saw the defendant almost upon her. She ran screaming around the house and was caught by him in front of the house. She was held tightly with one arm and hand while he placed the other hand over her mouth and nose, the thumb being forced into her mouth under the plate of her false teeth. In the struggle her eye glasses were bent out of shape and knocked off. The defendant then dragged and pulled her over onto the porch of her house, took the key from her, opened the door, pushed and dragged her into the house, locked the door, and put the key in his pocket. The complainant testified that she screamed as long as she was able and that this was the reason the defendant put his hand over her mouth. After they were in the house the defendant held her fast while they went into the back part of the house. She suffered from thirst and the defendant permitted her to get a

drink of water. He then grasped her and pulled and dragged her up stairs and into a room, locked the door, and proceeded to take off his clothes. She observed him removing his clothing and removed the wet shawl she had worn out in the rain. She testified that she was then afraid to scream for fear that she would not be allowed to live. He then took off her shoes and stockings, removed her skirts, and threw her upon the bed. She testified that she pushed him away as long as she had strength and that she was exhausted and almost terrorized by fear. He then tried to have intercourse with her, but failed because she was not in a suitable position. He then took her by the feet and dragged her into position and then accomplished the act of sexual intercourse. After the act he allowed her to get up. She got some clothes, crawled down stairs and dressed herself, went into the cellar way, locked the door between it and the dining room, and stayed there from 2 o'clock until nearly 6 in the morning. She testified that she was afraid to go out for fear the defendant would hear her, follow and overtake her, misuse her again and probably kill her, and she was afraid to go out when there was nobody moving on the streets. Shortly before 6 she went to the house of the neighbor at whose door she had knocked during the night, and on being admitted told him what had occurred. While she was at this house the defendant left her house and she shortly went home. About 11 o'clock she was driven down to a justice's office and made the complaint. She was confined to her bed for two days. She says she slept very little for four nights thereafter. The skin on her nose was broken, the membrane of the mouth was abrased and broken by the defendant's thumb, there was an abrasion on her arm and a large bruise on the calf of her leg.

There was evidence that the cries of the complainant were heard by one person from an eighth to a quarter of a mile away and by another person three blocks away. The neighbor to whose home she went in the morning, another neighbor who came in later and who took her down to the justice's of-

fice, and the justice, all testified that she was very nervous and excited. Her nearest neighbor testified that when she came to his house in the morning she looked like a crazy woman and that he hesitated to let her in. She was permitted to testify as to what she stated to some of these persons. A physician testified to the bruises and to the very nervous state of the complainant.

The defendant was arrested on October 7, 1910, in another county, where he had been traced by the officers.

The defendant prosecutes this writ to review the trial wherein he was found guilty as charged in the information and sentenced to the state prison for the term of fourteen years.

For the plaintiff in error the cause was submitted on the brief of *John Courtney.*

For the defendant in error there was a brief by the *Attorney General, Russell Jackson,* deputy attorney general, and *George B. Clementson,* district attorney, and oral argument by *Mr. Jackson.*

SIEBECKER, J. The contention is made that the evidence does not sustain the verdict finding the defendant guilty of the crime charged. The claim is that the evidence fails to establish that the defendant had sexual intercourse with the complaining witness by force and against her will. The foregoing statement contains a statement of the facts which her evidence tends to prove and which the other facts and circumstances of the case corroborate in material and essential points. The claim that portions of her evidence show that she did not employ all available means at her command to repel defendant's attack and to prevent him from ravishing her person is based on parts of her evidence disassociated from other facts testified to by her which explain those statements. They must be read together. When considered as a whole, the evidence furnishes abundant proof to warrant the jury in concluding that she resisted him to the utmost and at no time vol-

untarily submitted to the violation of her person. We are cited particularly to the statements she made that after she had been assaulted and dragged to her bedroom she ceased striking, kicking, and making other like resistance to his assault. It is manifest from her evidence that her physical powers had then been exhausted by reason of the prolonged struggle, to the point of incapacitating her to effectually resist his attack, and that she was then so terrified in mind as to be well nigh incapable of continuing her resistance to repel him. The evidence amply sustains the conclusion of the jury. It shows the utmost reluctance on her part and that she made every reasonable effort within her power to prevent him from accomplishing his purpose. We consider that the evidence fully sustains the verdict.

It is claimed that the court erred in permitting the district attorney to conduct the examination of the state witnesses in an illegal and highly prejudicial manner. Defendant was represented by counsel. No objection was taken on the trial to the procedure now complained of, and we find nothing in the record justifying any claim that counsel representing the defendant at the trial was derelict in his duty in not interposing objection to leading questions now brought to our attention. True, as appears, the prosecuting attorney propounded leading questions to the complaining witness concerning matters as to which she exhibited no reluctance to testify and which she was able to state to the jury by narrating the facts in the manner witnesses usually narrate them without suggestion from court or counsel. This, however, does not in itself show that the defendant's best interests on the trial were not subserved by omitting to object to this course of procedure. The manner of conducting trials is so subtle in its effects that those in charge of them are far better able to determine whether the rights of parties are being prejudiced than persons not participating, and we doubt not that the defendant's counsel had good reasons for permitting the examinations to proceed as they did, though the questions propounded were

technically objectionable as leading. It is also well settled that a trial court may in its discretion permit such a course of procedure if it promotes the ends of justice and does not thereby deprive a defendant of any of his legal rights. An examination of the evidence discloses also that the facts embraced in the leading questions now complained of were testified to by the complaining witness in response to inquiries not leading in form. Under the circumstances we discover no prejudicial results to defendant's rights in this respect. The implication of these complaints respecting the conduct of the court and the defendant's counsel on the trial has called for these observations though no exceptions respecting them are preserved in the record.

It is further contended that the instructions of the court in submitting the case to the jury were prejudicially erroneous as regards the presumption of innocence, as to informing them of the penalty prescribed for an offense like this, the degree of resistance required by the female to show nonconsent, and as to a portion of the instructions assuming essential facts at issue as established by the evidence. These exceptions to the charge are not well taken. The court properly informed the jury of all the essential ingredients of the crime charged, and instructed them that in law the defendant was presumed to be innocent and that they would not be warranted in finding him guilty unless guilt were proven beyond a reasonable doubt. As to the degree of resistance required of the party thus assaulted the jury were told that:

"There can be no rape of a female where there is consent, no matter how reluctantly it be given. To constitute rape the connection must be against her will, and there must be the utmost reluctance and resistance on her part, or her will must be overcome by fear and terror so extreme as to preclude resistance."

The instructions on the foregoing features of the case, as well as those pertaining to the presumption of innocence and the burden of proof, state the law correctly. They were

couched in plain and clear language and manifestly informed the jury of the law and of their duty in determining the issues submitted. Nor do we find that the court improperly assumed as proven any controverted facts which were for determination by the jury.

The record sustains the verdict and no reversible errors intervened.

By the Court.—Judgment affirmed.

INCOME TAX CASES.

STATE EX REL. BOLENS vs. FREAR, Secretary of State, and others.

WINDING and others, Appellants, vs. FREAR, Secretary of State, and others, Respondents.

November 20, 1911—March 12, 1912.

SUPREME COURT: JURISDICTION. (1–15) *Original jurisdiction, when exercised: Questions* publici juris: *Prerogative writs: Actions by the state: Private relators: Taxpayers' actions: Restraining expenditures by state officers under invalid statute: Questions determined.*

CIRCUIT COURTS: JURISDICTION. (10) *Injunction: Prerogative writs.* (35) *Taxpayers' actions.*

TAXATION OF INCOMES: CONSTITUTIONAL LAW. (16–34) *Equal protection of the laws: Double taxation: Land and income therefrom: Classification: Different rates: Progressive rates: Exemptions: Nonresidents: Partnerships: Corporations: Corporate bonds: What included in "income:" Rental value of residence: Income of wife and children: Officers: Local self-government: Assessors of incomes, how elected or appointed: Tax commission: Delegation of legislative power.*

STATUTES. (15, 20, 29–34) *Construction: Partial invalidity: Retroactive law.*

1. Actions against the state, brought in the supreme court by virtue of the consent of the state given in sec. 3200, Stats. (1898), are not within the purview of the decision in this case, and nothing said in the opinion is to be construed as having any bearing on that section or actions under it.

2. The original jurisdiction of the supreme court is a jurisdiction reserved for the use of the state itself when it appears to be necessary to vindicate or protect its prerogatives or franchises or the liberties of its people: the state uses it to punish or prevent wrongs to itself or to the whole people.
3. The state in such a case is always the plaintiff and the only plaintiff, whether the action be brought by the attorney general or, against his consent, on the relation of a private individual under the permission and direction of the court. The private relator is a mere incident; he brings the public injury to the attention of the court, and the court by virtue of the power granted by the constitution commands that the suit be brought by and for the state.
4. Cases falling within the following general classes have been held to be properly within the original jurisdiction of the supreme court, *i. e.*, those in which (1) a citizen is wrongfully deprived of his liberty; (2) a state office has been usurped; (3) a franchise grantable only by the state has been usurped, abused, or forfeited; (4) a law regulating public-service corporations in the interests of the people is systematically disobeyed and set at naught; (5) a navigable river which the state is bound to keep open as a highway for all is obstructed or encroached upon, or a public railroad built under a charter granted by the state is about to be destroyed; (6) a state officer declines to perform a ministerial duty in the performance of which the people at large have a material interest; (7) a state officer is about to perform an official act materially affecting the interests of the people at large, which is contrary to law or imposed upon him by the terms of a law which violates constitutional provisions; (8) the situation is such, in a matter *publici juris*, that the remedy in the lower courts is entirely lacking or absolutely inadequate, and hence jurisdiction must be taken or justice will be denied.
5. It is not meant by this classification that cases may not arise which will call for the exercise of the original jurisdiction, although they may not fall within either of the classes named.
6. A case, although involving a question *publici juris*, will not come within the original jurisdiction if it be only local in its effect, subject only to the exception named in the eighth class above mentioned.
7. A case involving a mere private interest, or one whose primary purpose is to redress a private wrong, will not be entertained.
8. A case will not be dismissed, however, because there is a private interest involved with the public interest, provided the private interest be incidental merely and the vindication of the public right be the primary purpose of the action.

9. An action involving a private as well as a public interest will not be dismissed merely because the private interest may drop out, provided the public and private interests be severable and the public interest still exists.
10. The constitution has not given the circuit court the power to use the writ of injunction as a prerogative jurisdictional writ, as it has been given to the supreme court; hence the circuit court has not the power, in an action not brought by the attorney general but on the relation of a private individual, to use the writ for prerogative purposes.
11. A taxpayer's action (as that action is known in the circuit court) wherein the taxpayer himself is the actual party, representing not the whole people or the state but a comparatively limited class, is not within the original jurisdiction of the supreme court.
12. The original jurisdiction may, however, properly be used at the instance and upon the relation of a private individual to stay by proper writ the expenditure of the state's funds for purposes expressly or by necessary implication forbidden by the constitution; but the action in such a case is the action of the state, not the action of the taxpaying relator.
13. Where state officials are about to spend the state's money in executing an unconstitutional law, an action may, by leave of the court, be brought in the name of the state to prevent the threatened misapplication of its funds; but the court will judge of the exigency in each case, and will endeavor to guard against the use of its original jurisdiction in trifling cases or to accomplish ulterior purposes.
14. The income tax law (ch. 658, Laws of 1911) makes such a sweeping change in general taxation policy and in methods of taxation throughout the state, and the resulting confusion would be so great if, after being in operation for a year or two, it should be held invalid, that a serious question as to the constitutionality of the law is a question seriously affecting the prerogatives of the state and the liberties of the people, and justifies the exercise of the original jurisdiction of the supreme court in an action, brought for the purpose of testing the validity of the law, to restrain administrative officers from expending state moneys in executing the same.
15. In such an action only those questions will be determined which may be considered as relating to the validity of the whole act, leaving for future consideration, as concrete cases may arise, the questions relating to the validity of minor provisions as to matters of detail.
16. Under sec. 1, art. VIII, Const., as amended, taxation of property and taxation of incomes are recognized as separate and distinct things, and both are permitted.

17. The taxation of land itself and also of the income derived therefrom, as provided in ch. 658, Laws of 1911, does not violate the XIVth amendment, Const. of U. S., guaranteeing "equal protection of the laws."
18. Said XIVth amendment does not lay upon the states an unbending rule of equal taxation: they may make exemptions, levy different rates upon different classes, tax such property as they choose, and make such deductions as they choose, so long as they obey their own constitutions and proceed within reasonable limits and general usage.
19. The progressive feature in the taxation of incomes under ch. 658, Laws of 1911, by which the rate is graduated according to the size of the taxable income, is expressly authorized by the state constitution and is not within the inhibition of the XIVth amendment, Const. of U. S.
20. Whether, under sec. 2, art. IV, Const. of U. S. (providing that the "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"), the provisions of ch. 658, Laws of 1911, which deny to nonresidents exemptions which are allowed to residents are valid, is not determined. If invalid, their invalidity does not affect the act as a whole.
21. The provision in said act which allows an assessment against a nonresident to be increased without notice, although in case of a resident notice must be given, does not violate sec. 2, art. IV, Const. of U. S.
22. The office of assessor of incomes, provided for in the act, is not a county, city, town, or village office, nor is it an office which existed in substance when the state constitution was adopted or which is essential to the existence or efficiency of either of the said municipal divisions. It is therefore not covered by the guaranties of local self-government found in sec. 4, art. VI, and sec. 9, art. XIII, Const.; and under the latter section such assessors may be elected or appointed in any way the legislature may direct.
23. It is not a delegation of legislative power to vest in the state tax commission, by law, the power of appointing assessors of incomes and fixing their salaries.
24. A classification by which exemptions allowed to individuals are denied to partnerships is based upon substantial differences between classes, does not involve unjust discrimination, and is valid.
25. So, also, a classification under which an exemption of life insurance to the amount of $10,000 is allowed to one legally dependent on the deceased, though denied to other persons, is valid.

26. The provision that a taxpayer who has paid a personal property tax for the year may have the amount so paid credited upon his income tax, does not involve any invalid classification.
27. Income, within the meaning of sec. 1, art. VIII, Const., as amended, need not be money, but may be that which is convertible into money; and the estimated rental of residence property occupied by the owner thereof may properly, as provided in the act, be taxed as a part of the owner's income.
28. The provision that the income of a wife living with her husband shall be added to his income, and the income of each child under eighteen years of age living with its parents shall be added to that of the parents, involves a classification based on substantial differences and is valid.
29. Neither the fact that incomes for the entire year 1911 are to be taxed, although the law did not go into effect until July 15th of that year, nor the fact that profits derived from the sale of property purchased at any time within three years previously are to be included, renders the law retroactive or void.
30. Whether the provision (in sec. 1087*m*—22) that the income of a resident of the state derived from different political subdivisions thereof shall be combined for the purpose of determining the exemptions and the rate, while the income of a nonresident is to be separately assessed and taxed in each of the municipalities from which it is derived—thus discriminating in some instances against residents by subjecting their incomes in part to higher rates,—is in violation of sec. 2, art. IV, Const. of U. S., not determined.
31. That part of sec. 1087*m*—6 which provides a rate of taxation for the incomes of corporations different from the rate prescribed for individuals, involves a classification based upon substantial differences and is valid.
32. Although the act in terms includes all corporations and does not specifically except national banks nor name the officers whose salaries cannot be constitutionally taxed, that fact does not invalidate it. If national banks or any public officers cannot constitutionally be subjected to the tax the law will be construed as not applying to them.
33. Whether the provisions, in sec. 1087*m*—2, under which the incomes of nonresidents are to be taxed so far as derived from sources within the state, and incomes derived from business interstate in its character are to be taxed on that portion thereof which is derived from business transacted and property located in the state (to be ascertained as therein stated), are valid, is not determined.
34. Whether the provision, in sec. 1087*m*—3 (b), that a portion of the interest on corporate bonds (to be ascertained as therein

provided) shall be taxed against the bondholders, and if not paid by them shall be enforced against the corporation and may then be deducted from the next interest payment on the bonds, is valid, not determined.

35. No taxpayers' action against auditing or disbursing officers of the state, to prevent them from paying moneys out of the state treasury, can be maintained in the circuit court.

MARSHALL, J., dissents in part.

TIMLIN, J., dissents in part.

KERWIN and BARNES, JJ., took no part in the decision of the question of jurisdiction.

ORIGINAL ACTION brought in this court on the relation of *Harry W. Bolens* against *James A. Frear,* Secretary of State, and others; also

APPEAL from an order of the circuit court for Dane county: E. RAY STEVENS, Circuit Judge. *Affirmed.*

The facts are stated in the opinion.

For the relator, *Bolens,* there was a brief by *Carpenter & Poss,* and oral argument by *Benjamin Poss.*

For the appellants *Winding* and others there was a brief by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and a separate brief by *Geo. D. Van Dyke,* of counsel, and oral argument by *J. G. Flanders, C. F. Fawsett,* and *Geo. D. Van Dyke.*

In support of the various contentions as to the invalidity of ch. 658, Laws of 1911, there were cited, in the briefs above mentioned, the following, among other authorities: *Pollock v. Farmers' L. & T. Co.* 157 U. S. 429, 580, 581, 15 Sup. Ct. 673; *Brown v. Maryland,* 12 Wheat. 419, 444; *Weston v. Charleston,* 2 Pet. 449; *Dobbins v. Comm'rs,* 16 Pet. 435; *Kennard v. Manchester,* 68 N. H. 61, 36 Atl. 553; *Second Ward Sav. Bank v. Milwaukee,* 94 Wis. 587, 595, 69 N. W. 359; *Kingsley v. Merrill,* 122 Wis. 185, 200, 99 N. W. 1044; *Philadelphia & S. S. Co. v. Pennsylvania,* 122 U. S. 326, 7 Sup. Ct. 1118; *Black v. State,* 113 Wis. 205, 89 N. W. 522; *Magoun v. Ill. T. & S. Bank,* 170 U. S. 283, 18 Sup. Ct. 594; *Kochersperger v. Drake,* 167 Ill. 122, 47 N. E. 321; *Estate*

of Cope, 191 Pa. St. 1, 21, 43 Atl. 79; *Estate of Mahoney,* 133 Cal. 180, 65 Pac. 389; *Huber v. Martin,* 127 Wis. 412, 434, 105 N. W. 1031, 1135; *Yick Wo v. Hopkins,* 118 U. S. 356, 369, 6 Sup. Ct. 1064; *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S. 232, 237, 10 Sup. Ct. 533; *Slauson v. Racine,* 13 Wis. 398; *State ex rel. Dwinnell v. Gaylord,* 73 Wis. 316, 325, 41 N. W. 521; *O'Connor v. Fond du Lac,* 109 Wis. 253, 264, 265, 85 N. W. 327; *Rathbone v. Wirth,* 150 N. Y. 459, 469, 45 N. E. 15; 8 Cyc. 779 *et seq.; State ex rel. Williams v. Samuelson,* 131 Wis. 499, 111 N. W. 712; *Union R. T. Co. v. Kentucky,* 199 U. S. 194, 26 Sup. Ct. 36; *Selliger v. Kentucky,* 213 U. S. 200, 29 Sup. Ct. 429; *Metropolitan L. Ins. Co. v. New Orleans,* 205 U. S. 395, 27 Sup. Ct. 499; *Buck v. Beach,* 206 U. S. 392, 400, 27 Sup. Ct. 712; *State Tax on Foreign-held Bonds,* 15 Wall. 300, 319; *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557; *Beals v. State,* 139 Wis. 544, 121 N. W. 347; 37 Cyc. 811; *Wis. Cent. R. Co. v. Taylor Co.* 52 Wis. 37, 87, 8 N. W. 833; *Knowlton v. Moore,* 178 U. S. 41, 82, 20 Sup. Ct. 747; *State ex rel. Winkler v. Benzenberg,* 101 Wis. 172, 76 N. W. 345; *Essex Co. Park Comm. v. West Orange,* 77 N. J. Law, 575, 73 Atl. 511, 512; *State v. Whitcom,* 122 Wis. 110, 99 N. W. 468; *State ex rel. Risch v. Trustees,* 121 Wis. 44, 98 N. W. 954; *Phipps v. Wis. Cent. R. Co.* 133 Wis. 153, 113 N. W. 456; *South Nashville St. R. Co. v. Morrow,* 87 Tenn. 406, 11 S. W. 348, 2 L. R. A. 853; *Ward v. Maryland,* 12 Wall. 418; *Sprague v. Fletcher,* 69 Vt. 69, 37 Atl. 239; 37 L. R. A. 840; *In re Stanford's Estate,* 126 Cal. 112, 54 Pac. 259; *Oliver v. Washington Mills,* 11 Allen, 268; *Connolly v. Union S. P. Co.* 184 U. S. 540, 560, 561, 567, 22 Sup. Ct. 431; *Clark v. Kansas City,* 176 U. S. 114, 119, 20 Sup. Ct. 284; *Cotting v. Kansas City S. Y. Co.* 183 U. S. 79, 22 Sup. Ct. 30; *Gulf, C. & S. F. R. Co. v. Ellis,* 165 U. S. 150, 159, 160, 17 Sup. Ct. 255; *W. C. Peacock & Co. v. Pratt,* 121 Fed. 772, 776; *Northern Pac. R. Co. v. Walker,* 47 Fed. 681; *Philadelphia F. Asso. v.*

New York, 119 U. S. 110, 120, 121, 7 Sup. Ct. 108; *San Mateo Co. v. Southern Pac. R. Co.* 13 Fed. 722, 733; *Nunnemacher v. State,* 129 Wis. 190, 223, 108 N. W. 627; *People v. Raymond,* 37 N. Y. 428; *State ex rel. Hessey v. Daniels,* 143 Wis. 649, 128 N. W. 565; *Kirtland v. Hotchkiss,* 100 U. S. 491, 498; *New Orleans v. Stempel,* 175 U. S. 309, 20 Sup. Ct. 110; *Tappan v. Merchants' Nat. Bank,* 19 Wall. 490; *Orleans Parish v. New York L. Ins. Co.* 216 U. S. 517, 523, 30 Sup. Ct. 385; *U. S. v. Erie R. Co.* 106 U. S. 327, 1 Sup. Ct. 223; *Hartman v. Greenhow,* 102 U. S. 672, 684; *Owensboro Nat. Bank v. Owensboro,* 173 U. S. 664, 19 Sup. Ct. 537; *Opinion of the Justices,* 53 N. H. 634; *Dyer v. Melrose,* 197 Mass. 99, 83 N. E. 6; *Dyer v. Melrose,* 215 U. S. 594, 30 Sup. Ct. 410; *Hamilton v. Fond du Lac,* 25 Wis. 496; *Richards v. Tarr,* 42 Kan. 547, 22 Pac. 557.

For the defendants and respondents there was a brief by the *Attorney General* and *Russell Jackson,* deputy attorney general; a separate brief by *J. E. Dodge,* special counsel for the state; separate briefs by *Geo. G. Greene,* counsel; and oral argument by *Mr. Jackson, Mr. Dodge,* and *Mr. Greene.* They cited, besides other cases, *Glasgow v. Rowse,* 43 Mo. 479; *Wilcox v. County Comm'rs,* 103 Mass. 544; *Drexel & Co. v. Comm.* 46 Pa. St. 31; *Comm. v. Brown,* 91 Va. 762, 21 S. E. 357; *New Orleans v. Hart,* 14 La. Ann. 803; *W. C. Peacock & Co. v. Pratt,* 121 Fed. 772; *Wintz v. Gerardey,* 31 La. Ann. 381, 388; *Waring v. Mayor, etc.* 60 Ga. 93, 99; *Alderman v. Wells,* 85 S. C. 507, 67 S. E. 781; Seligman, Income Tax, ch. 5, and cases cited; Kennan, Income Taxation, ch. 1; *Black v. State,* 113 Wis. 205, 89 N. W. 522; *Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627; *Beals v. State,* 139 Wis. 544, 121 N. W. 347; *Magoun v. Ill. T. & S. Bank,* 170 U. S. 283, 18 Sup. Ct. 594; *Billings v. Illinois,* 188 U. S. 97, 104, 23 Sup. Ct. 272; *Blackstone v. Miller,* 188 U. S. 189, 23 Sup. Ct. 277; *Clark v. Titusville,* 184 U. S. 329, 22 Sup. Ct. 382; *Kochersperger v. Drake,* 167 Ill. 122, 47 N. E.

321; *Knowlton v. Moore,* 178 U. S. 41, 20 Sup. Ct. 747; *Flint v. Stone Tracy Co.* 220 U. S. 107, 31 Sup. Ct. 342; *In re Appointment of Revisor,* 141 Wis. 592, 124 N. W. 670; *Ex parte Gerino,* 143 Cal. 412, 77 Pac. 166; 23 Am. & Eng. Ency. of Law (2d ed.) 328, 342, 394; 27 id. 603, 618; *Chicago & N. W. R. Co. v. State,* 128 Wis. 553, 108 N. W. 557; *State v. Bullen,* 143 Wis. 512, 128 N. W. 109; *Matter of Cornell,* 170 N. Y. 423, 63 N. E. 445; *Frothingham v. Shaw,* 175 Mass. 59, 55 N. E. 623; *Liverpool & L. & G. Ins. Co. v. Board,* 221 U. S. 346, 356, 31 Sup. Ct. 550; 37 Cyc. 802, 805, 824; *Metropolitan L. Ins. Co. v. New Orleans,* 205 U. S. 395, 27 Sup. Ct. 499; *New Orleans v. Stempel,* 175 U. S. 309, 20 Sup. Ct. 110; *Kidd v. Alabama,* 188 U. S. 730, 23 Sup. Ct. 401; *Bristol v. Washington Co.* 177 U. S. 133, 20 Sup. Ct. 585; *Bonaparte v. Tax Court,* 104 U. S. 592; *Simpson v. Hopkins,* 82 Md. 478, 33 Atl. 714; *People v. M. S. & N. I. R. Co.* 4 Mich. 398; *U. S. v. Erie R. Co.* 106 U. S. 327, 1 Sup. Ct. 223; *Railroad Co. v. Collector,* 100 U. S. 595; *State Railroad Tax Cases,* 92 U. S. 575, 607; *Blackstone v. Miller,* 188 U. S. 189, 204, 23 Sup. Ct. 277; *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S. 232, 10 Sup. Ct. 533; *Savings & L. Soc. v. Multnomah Co.* 169 U. S. 421, 427, 18 Sup. Ct. 392; *Society for Savings v. Coite,* 6 Wall. 607; *Kidd v. Alabama,* 188 U. S. 730, 733, 23 Sup. Ct. 401, 402; Cooley, Taxation (3d ed.) 387 *et seq.; St. Joseph v. Ernst,* 95 Mo. 360, 367, 8 S. W. 558; *Drexel v. Comm.* 46 Pa. St. 31; Cooley, Const. Lim. (2d ed.) 291, 309; *Stockdale v. Ins. Cos.* 20 Wall. 323, 331; *Schuylkill Nav. Co. v. Elliott,* 21 Fed. Cas. 762; *U. S. Trust Co. v. New Mexico,* 183 U. S. 535, 22 Sup. Ct. 172; *Flanders v. Merrimack,* 48 Wis. 567, 4 N. W. 741; *Morrow v. Green Bay,* 55 Wis. 112, 12 N. W. 437; *People ex rel. Metropolitan St. R. Co. v. Tax Comm'rs,* 199 U. S. 1, 46, 47, 25 Sup. Ct. 705; *Tucker v. Ferguson,* 22 Wall. 527; *Delaware Railroad Tax,* 18 Wall. 206; *Hoge v. R. & D. R. Co.* 99 U. S. 348; *Davidson v. New Orleans,* 96

U. S. 97; *Memphis G. L. Co. v. Taxing Dist.* 109 U. S. 398, 3 Sup. Ct. 205; *Merchants' & M. Bank v. Pennsylvania,* 167 U. S. 461, 463, 17 Sup. Ct. 829; *Travellers' Ins. Co. v. Connecticut,* 185 U. S. 364, 371, 372, 22 Sup. Ct. 673; *State v. Clement Nat. Bank,* 84 Vt. 167, 78 Atl. 944, 952; Cooley, Const. Lim. (7th ed.) 574; *Paul v. Virginia,* 8 Wall. 168, 180; *McKane v. Durston,* 153 U. S. 684, 687, 14 Sup. Ct. 913; *Duryea v. Muse,* 117 Wis. 399, 406, 407, 94 N. W. 365; *London County Council v. Att'y Gen.* [1901] App. Cas. 26, 45; *Ystradyfodwg & P. M. S. B. v. Bensted,* [1907] App. Cas. 264; *Tennant v. Smith,* [1892] App. Cas. 150, 164; *Corke v. Fry,* 32 Scot. L. Rep. 341, 3 Tax Cas. 335; *McDougall v. Sutherland,* 31 Scot. L. Rep. 630, 3 Tax Cas. 261; Pratt & Redman, Income Tax Law (8th ed.) 1, 13, 14, note.

A brief was filed by *F. C. Winkler,* as *amicus curiæ,* upon the question whether the court has or should exercise jurisdiction in these actions.

In a brief filed by *Miller, Mack & Fairchild,* as *amici curiæ,* they contended that the tax imposed by ch. 658, Laws of 1911, is levied directly upon receipts from interstate and foreign commerce, and is therefore a regulation of interstate and foreign commerce, in violation of sec. 8, art. I, Const. of U. S. *Fargo v. Michigan,* 121 U. S. 230, 7 Sup. Ct. 857; *Philadelphia & S. S. Co. v. Pennsylvania,* 122 U. S. 326, 7 Sup. Ct. 1118; *Galveston, H. & S. A. R. Co. v. Texas,* 210 U. S. 217, 28 Sup. Ct. 638; *Western Union T. Co. v. Kansas,* 216 U. S. 1, 30 Sup. Ct. 190; *State ex rel. Carr v. Woodruff S. & P. C. Co.* 114 Ind. 155, 15 N. E. 814; *Northern Pac. R. Co. v. Raymond,* 5 Dak. 356, 40 N. W. 538; *Vermont & C. R. Co. v. Vermont Cent. R. Co.* 63 Vt. 1, 21 Atl. 262, 731; *Delaware & H. C. Co. v. Comm.* 1 Pa. Sup. Ct. Cas. 36, 17 Atl. 175; *People ex rel. C. T. R. Co. v. Miller,* 178 N. Y. 194, 70 N. E. 472. The scheme of taxation proposed by the act is necessarily a tax upon gross receipts. In other words,

the word "income," as used in the act, means practically gross receipts, not profits. *People v. Sup'rs,* 4 Hill (N. Y.) 20, 23; *Mundy v. Van Hoose,* 104 Ga. 292, 30 S. E. 783, 786; *Reg. v. Comm'rs,* L. R. 4 H. L. 449, 470, 483, 39 L. J. Q. B. 253, 23 L. T. Rep. N. S. 111; *Jones v. Ogle,* L. R. 8 Ch. App. 192, 196, 42 L. J. Ch. 334, 27 L. T. Rep. N. S. 367; *In re West Riding of Y. P. B. B. Soc.* 43 Ch. D. 407, 415, 59 L. J. Ch. 197, 62 L. T. Rep. N. S. 486.

David S. Wegg, as *amicus curiæ,* argued, among other things, that any tax imposed upon interest coupons or dividends upon stock in the hands of nonresidents is extraterritorial, not within the jurisdiction of the taxing power, and void. The *situs* of such intangible property is in the domicile of the owner. It is not here and cannot be taxed here. *State ex rel. Dwinnell v. Gaylord,* 73 Wis. 316, 41 N. W. 521; *Renier v. Hurlbut,* 81 Wis. 24, 50 N. W. 783; *Bragg v. Gaynor,* 85 Wis. 468, 482, 55 N. W. 919; *Parker v. Stoughton M. Co.* 91 Wis. 174, 180, 64 N. W. 751; *Perrigo v. Milwaukee,* 92 Wis. 236, 65 N. W. 1025; *Kingsley v. Merrill,* 122 Wis. 185, 99 N. W. 1044; *State v. Bullen,* 143 Wis. 512, 128 N. W. 109; *Railroad Co. v. Jackson,* 7 Wall. 262, 267, 268; *St. Louis v. Ferry Co.* 11 Wall. 423; *State Tax on Foreign-held Bonds,* 15 Wall. 300, 319, 320; *Bailey v. Railroad Co.* 22 Wall. 604; *Murray v. Charleston,* 96 U. S. 432; *Kirtland v. Hotchkiss,* 100 U. S. 491; 106 U. S. (Appendix) 704; *New Orleans v. Houston,* 119 U. S. 265, 7 Sup. Ct. 198; *New York, L. E. & W. R. Co. v. Pennsylvania,* 153 U. S. 628, 648, 14 Sup. Ct. 952; *Savings & L. Soc. v. Multnomah Co.* 169 U. S. 421, 426–428, 18 Sup. Ct. 392; *New Orleans v. Stempel,* 175 U. S. 309, 20 Sup. Ct. 110; *Bristol v. Washington Co.* 177 U. S. 133, 141, 143, 20 Sup. Ct. 585; *State Board v. Comptoir Nat. d'Escompte,* 191 U. S. 388, 402, 404, 24 Sup. Ct. 109; *Fargo v. Hart,* 193 U. S. 490, 499, 24 Sup. Ct. 498; *Pennsylvania L. Mut. F. Ins. Co. v. Meyer,* 197 U. S. 407, 416, 25 Sup. Ct. 483; *Union R. T. Co.*

v. Kentucky, 199 U. S. 194, 26 Sup. Ct. 36; *Metropolitan L. Ins. Co. v. New Orleans,* 205 U. S. 395, 27 Sup. Ct. 499; *Buck v. Beach,* 206 U. S. 392, 406, 407, 27 Sup. Ct. 712; *Liverpool & L. & G. Ins. Co. v. Board,* 221 U. S. 346, 31 Sup. Ct. 550; *Boyd v. Selma,* 96 Ala. 144, 11 South. 393, 16 L. R. A. 729; *North Carolina R. Co. v. Comm'rs,* 91 N. C. 454; *Oliver v. Washington Mills,* 11 Allen, 268. The provisions of the income tax law applied to nonresident holders of shares of stock in railway companies, corporations of Wisconsin, are invalid. If the tax is on the dividends or profits derived from such shares of stock, then it is a tax on the shares themselves. *Railroad Co. v. Jackson,* 7 Wall. 262; *Weston v. Charleston,* 2 Pet. 449; *Almy v. California,* 24 How. 169; *Dobbins v. Comm'rs,* 16 Pet. 435; *Fairbank v. U. S.* 181 U. S. 283, 21 Sup. Ct. 648; *Selliger v. Kentucky,* 213 U. S. 200, 29 Sup. Ct. 449; *Brown v. Maryland,* 12 Wheat. 419; *Philadelphia & S. S. Co. v. Pennsylvania,* 122 U. S. 326, 7 Sup. Ct. 1118; *Galveston, H. & S. A. R. Co. v. Texas,* 210 U. S. 218, 28 Sup. Ct. 638; *Pollock v. Farmers' L. & T. Co.* 157 U. S. 429, 15 Sup. Ct. 673; *Pollock v. Farmers' L. & T. Co.* 158 U. S. 601, 618, 15 Sup. Ct. 912. But shares of stock in Wisconsin railway companies which pay taxes on their property under ch. 315, Laws of 1903, are exempt from further taxation when owned or held by individuals of the state. Being exempt in the hands of residents of the state, they are likewise exempt in the hands of nonresidents. If a tax on the dividends or profits derived from such shares of stock is a tax on the property of the company which such shares represent, the tax is invalid. Sec. 25, ch. 315, Laws of 1903. If the tax on the dividends is neither a tax on the shares of stock nor on the property of the company which the shares represent, but is a tax on the dividends, separate and apart from both the shares of stock and the property, then such dividends as are received by nonresidents are not taxable under the act.

In a brief by *Lines, Spooner, Ellis & Quarles,* as *amici curiæ,* they contended (1) the income tax act is void because it discriminates against residents and in favor of nonresidents, contrary to art. IV and amendm. XIV, Const. of U. S.; (2) said act is void because it remits the income tax to the extent of taxes paid upon personal property, thus creating an unlawful discrimination in favor of persons owning personal property as against those owning none.

A brief filed by *Oscar M. Fritz,* as *amicus curiæ,* was devoted to the proposition that the income tax act is invalid because under subd. 2, 3, sec. 1087*m*—22, the tax is imposed by a different rule, and is rendered unequal in its operation, upon income of the same kind, in the same situation, and used for the same purpose. These provisions unquestionably subject the income of a resident to a higher rate of taxation than the income of a nonresident of the same character, although the income of each is equal in amount and is derived from the same source, under the same circumstances. Sec. 1, art. I, Const.; sec. 1, amendm. XIV, Const. of U. S.; *State v. Whitcom,* 122 Wis. 110, 118, 99 N. W. 468; *Black v. State,* 113 Wis. 205, 219, 89 N. W. 522; *W. C. Peacock & Co. v. Pratt,* 121 Fed. 772, 776; *Pollock v. Farmers' L. & T. Co.* 157 U. S. 429, 599, 600, 15 Sup. Ct. 673.

The following opinions were filed January 9, 1912:

WINSLOW, C. J. These are actions in equity, brought for the purpose of enjoining the secretary of state and other state officers, including the tax commission, from paying out any state moneys, or doing any other administrative acts in the enforcement of the newly passed income tax law of this state, known as ch. 658, Laws of 1911, on the ground that said act is unconstitutional.

The *Bolens* action is an action sought to be brought within the original jurisdiction of this court, after refusal by the attorney general to bring it. This court, upon application

for leave to bring the action upon the relation of *Bolens* (a taxpayer), granted such leave, but expressly provided in the order that the question whether such action was an action properly within the original jurisdiction of this court should be reserved and argued with the demurrer upon the merits.

The *Winding* case is an action originally brought in the circuit court for Dane county by various persons and corporations who claim that they will be injuriously affected in various different ways by the provisions of the law. A demurrer on the three grounds of want of jurisdiction, want of legal capacity to sue, and insufficiency of facts having been sustained by the circuit court, the plaintiffs appeal to this court; and all the cases were argued together, briefs being also filed by several members of the bar as *amici curiæ*.

The law which is attacked in these actions adds thirty sections to the statutes, and also makes very substantial changes by amendment and repeal in secs. 1036 and 1038 of the existing statutes relating to the taxation of personal property. The first section of the law is numbered 1087*m*—1, and provides generally for the taxation of all incomes received during the year 1911, and annually thereafter.

Sec. 1087*m*—2 provides (1) that the term "person," as used in the act, shall include "any individual, firm, copartnership, and every corporation, joint-stock company or association organized for profit, and having a capital stock represented by shares," unless otherwise stated; (2) that the term "income" shall include:

a. All rent of real estate, including estimated rental of residence property occupied by the owner,

b. Interest on loans or evidences of debt of any kind,

c. Wages, salaries, or fees derived from services; *provided* that salaries of public officers are not to be included in those cases where the taxation thereof would be repugnant to the constitution,

d. All dividends or profits from stock or from the purchase

and sale of any property acquired within three years previously, or from any business whatever,

e. Royalties derived from the possession or use of franchises or legalized privileges of any kind,

f. All other income from any source, except such as is exempted by the act;

(3) that "the tax shall be assessed, levied and collected upon all income, not hereinafter exempted, received by every person residing within the state, and by every nonresident of the state upon such income as is derived from sources within the state or within its jurisdiction. So much of the income of any person residing within the state as is derived from rentals, stocks, bonds, securities or evidences of indebtedness shall be assessed and taxed, whether such income is derived from sources within or without the state; provided that any person engaged in business within and without the state shall, with respect to income other than that derived from rentals, stocks, bonds, securities or evidences of indebtedness, be taxed only upon that proportion of such income as is derived from business transacted and property located within the state, which shall be determined in the manner specified in subdivision (e) of section 1770*b*, as far as applicable."

Sec. 1087*m*—3 provides in substance for the following deductions by corporations and joint-stock companies:

a. Sums paid within the year for personal services of all officers and employees actually employed in the production of the income;

b. Other ordinary and necessary expenses paid within the year in the maintenance and operation of its business and property, including reasonable depreciation of the property from which the income is derived. All bonds issued by a corporation shall be deemed an interest in the property and business of the corporation, and so much of the interest on the bonds as is represented by the ratio of the total property located and business transacted in the state to the whole property and business of the corporation as provided in subd. 3

of 1087*m*—2 shall be subject to taxation at the same rate as the income and shall be assessed to the bondholders under the general designation of "the bondholders of" the particular corporation on the property of the corporation prior to other liens, and unless paid by the bondholders shall be enforced against the corporation, which may deduct the amount of the tax from the next interest payment on the bond.

c. Losses sustained during the year not compensated for by insurance or otherwise.

d. Sums paid within the year for taxes imposed by any other state upon the source from which the income taxed by this act is derived.

e. Dividends or income received during the year from stocks or interest in any firm, corporation, or joint-stock company, the income of which has been assessed under this act.

f. Interest received from bonds or securities exempt from taxation under United States laws.

By sec. 1087*m*—4 it is provided in substance that persons other than corporations and joint-stock companies shall be allowed the following deductions:

a. Ordinary and necessary expenses actually paid in carrying on the business from which the income is derived, including a reasonable allowance for depreciation in the property from which the income is derived.

b. Losses during the year not compensated by insurance or otherwise.

c. Dividends or incomes from stocks or interest in any firm or corporation, the income of which has been assessed under this act.

d. Interest paid during the year on existing indebtedness.

e. Interest on bonds or securities exempt under United States laws.

f. Salaries received from the United States by United States officials.

g. Pensions received from the United States.

h. Taxes (other than inheritance taxes) paid during the year on the property or business from which the income is derived.

i. Devises, bequests, or inheritances received during the year upon which an inheritance tax has been paid.

j. Life insurance to the amount of $10,000 received by persons legally dependent on the decedent.

Sec. 1087*m*—5 provides in substance for the following exemptions:

(1) a. To an individual, $800.

b. To husband and wife, $1,200.

c. For each child under eighteen years, $200.

d. For each additional person legally and wholly dependent on the taxpayer for support, $200.

e. These exemptions do not apply to nonresidents, nor to firms, corporations, or joint-stock companies. In computing such exemptions and the amounts of taxes payable under sec. 1087*m*—7, the income of a wife living with her husband shall be added to the husband's, and the income of each child living with its parent or parents shall be added to the parents' income.

(2) Income of mutual, savings, or loan and building associations, and of any religious, scientific, educational, benevolent, or other association not organized or conducted for pecuniary profit.

(3) Income from property and privileges by persons now required to pay taxes or license fees into the state treasury in lieu of taxes. Such persons shall continue to pay taxes and license fees as heretofore.

(4) Income received by the United States, the state, and all counties, cities, villages, school districts, or other political units of the state.

Sec. 1087*m*—6 provides in substance that the tax, after

making such deductions and exemptions, shall be computed at the following rates:

(1)	a.	On first	thousand	dollars	or	part	thereof,	1 %
	b.	" second	"	"	"	"	"	1¼ %
	c.	" third	"	"	"	"	"	1½ %
	d.	" fourth	"	"	"	"	"	1¾ %
	e.	" fifth	"	"	"	"	"	2 %
	f.	" sixth	"	"	"	"	"	2½ %
	g.	" seventh	"	"	"	"	"	3 %
	h.	" eighth	"	"	"	"	"	3½ %
	i.	" ninth	"	"	"	"	"	4 %
	j.	" tenth	"	"	"	"	"	4½ %
	k.	" eleventh	"	"	"	"	"	5 %
	l.	" twelfth	"	"	"	"	"	5½ %
		On any sum exceeding $12,000,						6 %

(2) *Provided* that the tax on corporations and joint-stock companies (after deductions) shall be computed as follows:

a. If the income equals 1 per cent. or less of assessed value of property used in acquiring the income, the rate shall be ½ of 1 per cent. of such income;

b. If the income equals more than 1, but not more than 3 per cent. of such value, 1 per cent. of the income;

c. If more than 2, but not more than 3 per cent., 1½ per cent. of the income;

d. If more than 3, but not more than 4 per cent., 2 per cent. of the income;

e. If more than 4, but not more than 5 per cent., 2½ per cent. of the income.

f. If more than 5, but not more than 6 per cent., 3 per cent. of the income;

g. In like manner, the tax shall increase at the rate of one half of one per cent. for each additional one per cent. or fraction thereof which the taxable income bears to the property employed in the acquisition of the income, until the rate of

profits equals twelve per cent. of property employed in the acquisition of the income, when such rate shall continue as a proportional rate of six per cent. of such taxable income.

Sec. 1087*m*—7 provides as follows:

"The legislature intends subsection 2, of section 1087*m*—6 of this act, to be a separable part thereof, so that said subsection may fail or be declared invalid without adversely affecting any other part of the act; provided that in event of its failing or being declared invalid the incomes of corporations, joint-stock companies and associations shall be subject and shall be construed to have been subject to taxation at the rates specified in subsection 1, of section 1087*m*—6, and said incomes shall be reassessed by the tax commission and taxed for the years for which the rates provided in subsection 2, of section 1087*m*—6, shall have failed."

The next fourteen sections of the act are administrative purely. By their terms the enforcement of the act is placed in the hands of the state tax commission, which is authorized and required to divide the state into taxing districts and appoint an assessor of incomes in each district. The manner in which incomes are to be assessed and the taxes are to be collected is fully provided for, but it is not necessary to insert the provisions here, as no question is raised upon the details of these provisions.

Sec. 1087*m*—22 provides in substance that the place at which the income tax shall be assessed, levied, and collected shall be determined as follows:

(1) Persons deriving income from within and without the state, or from two or more political subdivisions of the state, shall report the parts so separately derived in separate accounts, in such form as the tax commission may prescribe.

(2) The entire taxable income of a resident of the state shall be combined for purpose of determining exemptions and rate of tax, but the taxes shall be paid to the several towns, cities, and villages in proportion to the income derived from

each, counting the income derived from without the state as derived from the town or city of the taxpayer's residence.

(3) The income of nonresidents derived from sources within the state shall be separately assessed and taxed in the town, city, or village from which it is derived.

(4) All laws not in conflict with this act, regulating time, place, and manner of collecting unpaid personal property taxes, shall apply to the income tax.

Sec. 1087*m*—23 provides that the revenue derived from the income tax shall be divided ten per cent. to the state, twenty per cent. to the county, and seventy per cent. to the town, city, or village in which it is assessed, levied, and collected.

Sec. 1087*m*—25 abolishes the office of county supervisor of assessment on and after the first Monday in January, 1912, and provides that the county supervisor of incomes shall after that date perform all the duties imposed by law upon the county supervisor of assessment.

Sec. 1087*m*—26 provides that any person paying a tax on personal property during any year may present his receipt therefor, and have the same accepted by the tax collector to its full amount in payment of income tax during said year; and that any bank paying taxes upon the shares of its individual stockholders may present the receipt therefor, and have the same accepted in payment of taxes upon the income of the bank during that year.

Sec. 1087*m*—27 provides that nothing in the act shall affect in any way the taxes for the year 1911 or the collection or enforcement thereof.

By the amendment to sec. 1036 of the Statutes of 1898, there is taken out of the items of personal property subject to taxation "all debts due from solvent debtors, whether on account, note, contract, bond, mortgage or other security, or whether such debts are due or to become due," also "moneys;"

and by the amendment to subd. 10 of sec. 1038, Stats. (1898), the following property is made exempt from taxation: "all moneys, all debts due or to become due to any person, and all stocks and bonds not otherwise specially provided for."

By the concluding sections of the act certain other changes are made in exemptions from taxation, which have the effect of somewhat enlarging such exemptions, especially in the line of personal ornaments and belongings and agricultural implements, but the details of these changes are not necessary to be stated.

At the inception of the *Bolens* case the question of jurisdiction is sharply raised; and it is very strongly argued, especially in a brief filed by Gen. F. C. Winkler, that this is not a case properly within the original jurisdiction of this court, as that jurisdiction has been defined and limited by the cases commencing with the *Railroad Cases* (*Att'y Gen. v. Railroad Cos.* 35 Wis. 425).

The argument, in brief, is that the action is nothing more nor less than a taxpayer's action; that such actions may properly be entertained in the case of illegal expenditures by cities, counties, villages, or other municipalities, but cannot properly be brought against state officers, because, in effect, they are actions against the state, and the state cannot be sued without its consent.

This objection might perhaps be summarily disposed of by a brief reference to the case of *State ex rel. Raymer v. Cunningham,* 82 Wis. 39, 51 N. W. 1133, where a case of similar character, brought on the relation of a taxpayer, was entertained and decided upon the merits against objection to the jurisdiction, and by further reference to the cases of *State ex rel. Garrett v. Froehlich,* 118 Wis. 129 (at page 143), 94 N. W. 50; *State ex rel. Rosenhein v. Frear,* 138 Wis. 173, 119 N. W. 894; and *In re Filer & S. Co.* 146 Wis. 629, 132 N. W. 584, in each of which cases the right to maintain similar actions in this court is either impliedly or expressly asserted.

We do not feel, however, that we ought to dispose of this very important question without thoroughly examining it, for several quite persuasive reasons. Reference to the cases just cited will show that the question never has been discussed in any opinion. In the *Raymer Case,* which is the first of the series and which was a case brought on the relation of a taxpayer to enjoin the payment of money to the state superintendent of public instruction, under a law which violated an express constitutional prohibition, it was said in substance that it was held in the case of *State ex rel. Att'y Gen. v. Cunningham,* 81 Wis. 440, 51 N. W. 724, that such an action was within the original jurisdiction of this court and would be entertained. It is very clear that the *Cunningham Case* was not such a case, and involved very different considerations. The *Cunningham Case* was an action brought on the relation of the attorney general to enjoin the secretary of state from giving election notices under an apportionment law which was held to deprive a very large number of the voters of the state of political rights guaranteed to them by the constitution. This was held to be an invasion of the liberties of the people, and hence the case came clearly within the original jurisdiction of this court as laid down in the *Railroad Cases.* No question of the wrongful expenditure of state funds, nor of a taxpayer's right to invoke the original jurisdiction of this court to prevent such expenditure, was involved or mentioned in the case.

No discussion of the question appears in the other cases cited, so it seems clear that the court has not yet taken up and considered the question as an original one.

It has been spoken of as a very important question, and advisedly so spoken of. Laws which are framed to meet and correct some existing situation deemed by the legislature to be undesirable will generally, or at least frequently, involve the expenditure of some money in their enforcement. If, whenever such a law is passed, it is within the power of any tax-

payer, however paltry his contribution to the public funds, to come into this court and invoke its original jurisdiction and compel it to pass upon the validity of the law, it is not difficult to forecast the result. Every important law will be adverse to the interests of some taxpayers, and with such a principle established this court stands in great danger of becoming to all intents and purposes a third chamber of the legislature, not named in the constitution, but exercising a veto power over the other houses when invoked by any taxpayer. The power to pass upon the constitutionality of laws when the question arises in the course of ordinary litigation is a great power, one to be exercised with the greatest possible caution and wisdom; but the power to take up and pass upon a law involving the expenditure of any state funds as soon as it is passed, at the suggestion of any taxpayer, and place a judicial veto upon its execution, is a still greater one. No higher power than this can well be conceived in a government such as ours; certainly no power will demand greater wisdom in its exercise, if it exists. This court has unquestionably taken the position in a number of well considered cases that the courts can and will restrain public officers from enforcing an unconstitutional law which invades private or public rights. *State ex rel. Att'y Gen. v. Cunningham,* 81 Wis. 440, 51 N. W. 724; *State ex rel. Lamb v. Cunningham,* 83 Wis. 90, 53 N. W. 35; *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885; *Wadhams Oil Co. v. Tracy,* 141 Wis. 150, 123 N. W. 785. But this court has clearly recognized that this power is a delicate one, and to be used only with a wise discretion. It was said in the last case cited that "it will not do to make of the courts, by equitable interference, a sort of a superior upper house to consider and pass, in general and particular as well, upon legislative enactments."

Concerning this power Judge Dodge very rightly observes in his brief in the present case:

"No higher power can be conceived than that of the judiciary to stay the action of the co-ordinate executive or legisla-

ture from an act or policy which the latter conscientiously believe to be constitutional and for public welfare. As the power is transcendent its exercise must be with caution and moderation; albeit with courage. The frequency of the attempts by individuals to invoke this power of veto invites the anxious consideration of the wisdom and propriety of its exercise in each case."

The question now before us is whether this court has consciously and advisedly held that it is sufficient to call for the exercise of this extreme power that a taxpayer come into court and demand that the public treasury be protected from the expenditure of funds under a law concerning whose constitutionality there may be doubt.

The consideration of this question has prompted us to make a re-examination of the entire question of the original jurisdiction of this court, and to make an attempt to classify the significant decisions upon the subject, in the hope that thereby the scope and purpose of that jurisdiction, as the court has endeavored to define and limit it, may be better understood. The results of this re-examination are now to be stated as briefly as may be.

The constitutional grant of jurisdiction to the supreme court (sec. 3, art. VII, Const.), after providing that it shall have appellate jurisdiction co-extensive with the state, provides that it "shall have a general superintending control over all inferior courts; it shall have power to issue writs of *habeas corpus, mandamus,* injunction, *quo warranto, certiorari,* and other original and remedial writs, and to hear and determine the same."

Since the decision of the *Railroad Cases,* 35 Wis. 425, it has been very well understood that by this section of the constitution three distinct and independent grants of power or jurisdiction were made to this court, viz.: (1) the appellate power; (2) the power of superintending control over inferior courts; and (3) the original jurisdiction to be exercised by means of the writs named in the section. We are only concerned here with the grant of original jurisdiction.

It will be at once noticed that this grant is practically unlimited in extent, except as it may be said to be limited by the scope of the writs named, and it is for this reason probably that (with the exception of *Att'y Gen. v. Blossom,* 1 Wis. 317, to be referred to later) practically no attempt was made, prior to the decision in the *Railroad Cases,* to discuss the purpose or limits of the original jurisdiction. It was very frequently exercised, but plainly with no clear or logical idea of the purposes for which it was given to the court, unless possibly it may be said that there was the idea that the wrong to be redressed or prevented must be a wrong affecting the public, or some part of the public of a given locality or class, as distinguished from a wrong affecting individuals only.

Habeas corpus was so frequently used that the citation of the cases would be mere surplusage. *Mandamus* to compel official action by local or municipal officers was also very frequent. Thus the court entertained and decided upon the merits actions of *mandamus* to compel town assessors to reduce an assessment of personal property, *State ex rel. Ward v. Assessors,* 1 Wis. 345; to compel a circuit judge to hold court in a new county, *State ex rel. Powers v. Larrabee,* 1 Wis. 200; to compel county supervisors to strike property from the assessment roll, *State ex rel. Beebe v. La Fayette Co.* 3 Wis. 816; to compel highway commissioners to act, *State ex rel. Doxtador v. Bailey,* 6 Wis. 291; to compel a school district clerk to make an official report to the town clerk, *State ex rel. School Dist. v. Eaton,* 11 Wis. 29; to compel county officers to locate their offices at a certain place as a means of testing the validity of county-seat elections, *Att'y Gen. ex rel. Turner v. Fitzpatrick,* 2 Wis. 542; *State ex rel. Cothren v. Lean,* 9 Wis. 279; *State ex rel. Spaulding v. Ellwood,* 11 Wis. 17; *State ex rel. Field v. Saxton,* 11 Wis. 27; *State ex rel. Gates v. Fetter,* 12 Wis. 566; to compel town supervisors to audit damages allowed in laying out a highway, *State ex rel. Van Vliet v. Wilson,* 17 Wis. 687; to compel a

city council to levy and collect a tax to pay a judgment or pay the expense of work done for the city, *State ex rel. Soutter v. Madison,* 15 Wis. 30; *State ex rel. Christopher v. Portage,* 12 Wis. 562; *S. C.* 14 Wis. 550; *State ex rel. Carpenter v. Beloit,* 20 Wis. 79; *State ex rel. Hasbrouck v. Milwaukee,* 25 Wis. 122; to compel a county board to admit one duly elected as a member to sit and act as such, *State ex rel. Gill v. Milwaukee Co.* 21 Wis. 443; to compel the mayor of a city to appoint certain officers, *State ex rel. Att'y Gen. v. O'Neill,* 24 Wis. 149; to compel a city treasurer to deliver certain books to the county clerk, *State ex rel. Saar v. Hundhausen,* 26 Wis. 432; to compel the transfer of prisoners from the Milwaukee jail to the house of correction, *State ex rel. Kennedy v. Brunst,* 26 Wis. 412; to compel county supervisors to erect county buildings, *State ex rel. Park v. Portage Co.* 24 Wis. 49; to compel county supervisors to provide certain officials with office rooms, *State ex rel. Keenan v. Milwaukee Co.* 25 Wis. 339; to compel the Milwaukee chamber of commerce to restore a member to his rights and franchises as a member, *State ex rel. Graham v. Chamber of Comm.* 20 Wis. 63; and doubtless other cases may be found.

It should be noted in this connection that in one case (*State ex rel. Board of Ed. v. Haben,* 22 Wis. 101) the court declined to entertain an action of *mandamus* against the treasurer of a city to compel him to pay over the school moneys in his hands to the school board, giving as a reason that the remedy in the circuit court was ample. Judge Cole there states that the practice of applying to the supreme court for writs of *mandamus* against local officers was becoming very common, and that in view of the increasing duties of the court, and in pursuance of a rule of court then recently adopted, it would be held in the future that "Wherever there is anything in the application which shows that it would be unavailing if made at the proper circuit, or where, from the nature of the questions involved, it would seem necessary and proper that

the suit be commenced in the supreme court, jurisdiction will be entertained. Otherwise it will not be, but parties will be required to make their application to the circuit court." This rule seems, however, to have been more honored in the breach than in the observance, as the cases just cited, which came up after the *Haben Case,* abundantly testify.

Quo warranto cases to try the title to public office, from that of governor down to school director, were very frequent. Thus the writ was used to try the title to the office of governor in *Att'y Gen. ex rel. Bashford v. Barstow,* 4 Wis. 567; of district attorney in *Att'y Gen. ex rel. Carpenter v. Ely,* 4 Wis. 420; of treasurer of a city in *State ex rel. Tesch v. Von Baumbach,* 12 Wis. 310; of school director in *State ex rel. Law v. Perkins,* 13 Wis. 411; of circuit judge in *State ex rel. Att'y Gen. v. Messmore,* 14 Wis. 115; of sheriff in *State ex rel. Peacock v. Orvis,* 20 Wis. 235; of justice of the peace in *State ex rel. Holden v. Tierney,* 23 Wis. 430; of supervisor in *State ex rel. Peck v. Riordan,* 24 Wis. 484; of superintendent of the poor in *State ex rel. Grundt v. Abert,* 32 Wis. 403; of treasurer of an incorporated church benevolent association in *State ex rel. Att'y Gen. v. Conklin,* 34 Wis. 21; and there are numerous similar cases. As tending to explain the large number of these cases involving only small local offices, it should be noticed that by ch. 23, Laws of 1855, any person claiming to be entitled to hold "any public office" usurped by another was given the right to file in the supreme court an information in the nature of a *quo warranto,* with or without the consent of the attorney general. While the code of pleading and practice which was passed the following year (ch. 120, Laws of 1856) entirely revised the practice in such cases, and contains no such sweeping provision, still resort seems to have been had to the supreme court in practically all cases of disputed title to office until the decision in the *Railroad Cases.*

Quo warranto to forfeit corporate charters for abuse or nonuse of franchises was also brought in *State v. Milwaukee G.*

L. Co. 29 Wis. 454, and in *State v. West Wis. R. Co.* 34 Wis. 197.

The foregoing citations by no means cover all of the cases in which the original jurisdiction was used prior to the *Railroad Cases,* but it is believed that they cover all that are of any significance, except the *Blossom Case* (which is to be soon considered), and it is also believed that they conclusively demonstrate that there was in the judicial mind during that period no serious thought that the original jurisdiction given to this court was intended to be or ought to be limited by excluding any particular class of cases therefrom, except probably cases involving mere individual wrongs, with which the public was in no manner concerned.

Relating to this subject, Judge Dixon might well say, as he did in his brief in the case of *Att'y Gen. v. Eau Claire,* 37 Wis. 400, at page 411, "It is not surprising that the court looked in vain to the bar for assistance in the argument of the *Railway Cases* when we reflect that both court and bar had been wandering in utter darkness for a period of more than twenty-five years." It is very evident that Judge Dixon knew whereof he spoke when he wrote these words. During fifteen years of the twenty-five he had been the leader of the wanderers.

It is quite plain, we think, that however valuable the cases which we have thus briefly reviewed may be as authorities on the general propositions of law involved in them (and many of them are very valuable in this respect), they have absolutely no value on the question of the extent of the original jurisdiction of the court, for that question was never discussed or considered in any of them, and they have been gathered together here for the simple purpose of demonstrating their worthlessness as precedents upon that question, and to prevent either bench or bar from placing reliance upon them so far as that question is concerned in the future.

The case of *Att'y Gen. v. Blossom,* 1 Wis. 317, has not been

included in the foregoing list because in that case, which was the first case where the original jurisdiction was challenged, there was an illuminating discussion in the opinion of Justice SMITH, not only of the existence of any original jurisdiction in this court, but also of the purposes which were intended to be accomplished by the exercise of that jurisdiction. After meeting the contention that the court had only appellate jurisdiction, and demonstrating that the armory of common-law writs with which the constitution endowed the court in the last clause of the section quoted were original in their functions and necessarily implied the exercise of original jurisdiction, he used these pregnant words, remarkable in their strength and wisdom now, and vastly more remarkable when it is reflected that they were written nearly sixty years ago:

"And, why was original jurisdiction given to the supreme court, of these high prerogative writs? Because these are the very armor of sovereignty. Because they are designed for the very purpose of protecting the sovereignty and its ordained officers from invasion or intrusion, and also to nerve its arm to protect its citizens in their liberties, and to guard its prerogatives and franchises against usurpation. The convention might well apprehend that it would never do to dissipate and scatter these elements of the state sovereignty among five, ten, twenty, or forty inferior tribunals, and wait their tardy progress through them to the supreme tribunal, upon whose decision must finally depend their efficacy. To preserve the liberties of the people, and to secure the rights of its citizens, the state must have the means of protecting itself."

Here was clearly expressed the great idea that the original jurisdiction was given to this court in order that the state might use it to protect itself and its sovereignty and the liberties of the people at large.

Strange indeed it seems that this idea so forcibly expressed in 1853 should have been completely ignored and forgotten for more than twenty years thereafter, notwithstanding the fact that applications for the exercise of that jurisdiction

were increasing in number year by year. When, however, in 1874, the state, through its chief law officer, essayed to use the original jurisdiction for the purpose of curbing the great railroad companies of the state and compelling them to obey an act fixing rates of carriage for freight and passengers, the question of the extent of the jurisdiction was again sharply brought to the mind of the court, and it was philosophically discussed by Chief Justice RYAN in words which have ever since that time been regarded as authoritatively determining the attitude of this court upon the question. They have been often quoted and applied since that time and are very familiar. In brief, the principle there decided was that, in order to put in motion the original jurisdiction of this court, the question must not only be *publici juris, i. e.* a question of public right, but it must be a question "affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." *Att'y Gen. v. Railroad Cos.* 35 Wis. 425.

In the case of *Att'y Gen. v. Eau Claire,* 37 Wis. 400, immediately following the *Railroad Cases,* where the attorney general invoked the original jurisdiction to restrain the alleged illegal obstruction of a navigable river flowing into the Mississippi, the same doctrine was announced and somewhat elaborated upon, especially with regard to the term *publici juris.* In this opinion it was said:

"Of course every question of municipal taxation is *publici juris.* But it is equally so whether it be raised by a taxpayer, or by the municipality, or by the state. It is not enough to put in motion the original jurisdiction of this court that the question is *publici juris;* it should be a question *quod ad statum reipublicæ pertinet.* . . .

"And though the question did not arise in this case, it is quite evident from all that has any bearing on it in *Att'y Gen. v. Railroad Cos.,* that to bring a case properly within the original jurisdiction of this court, it should involve, in some way, the general interest of the state at large. It is very true that the whole state has an interest in the good administration

of every municipality; so it has in the well doing of every citizen. Cases may arise, to apply the words of C. J. STOW, geographically local, politically not local; local in conditions, but directly affecting the state at large. Cases may occur in which the good government of a public corporation, or the proper exercise of the franchise of a private corporation, or the security of an individual, may concern the prerogative of the state. The state lends the aid of its prerogative writs to public and private corporations and to citizens in all proper cases. But it would be straining and distorting the notion of prerogative jurisdiction to apply it to every case of personal, corporate or local right, where a prerogative writ happens to afford an appropriate remedy. To warrant the assertion of original jurisdiction here, the interest of the state should be primary and proximate, not indirect or remote; peculiar perhaps to some subdivision of the state, but affecting the state at large, in some of its prerogatives; raising a contingency requiring the interposition of this court to preserve the prerogatives and franchises of the state, in its sovereign character; this court judging of the contingency, in each case, for itself. For all else, though raising questions *publici juris,* ordinary remedies and ordinary jurisdictions are adequate. And only when, for some peculiar cause, these are inadequate, will the original jurisdiction of this court be exercised for protection of merely private or merely local rights. . . .

"It was suggested that we should establish general rules governing our original jurisdiction. That would be too bold an undertaking to venture on. Rules will arise, as cases come here, far more safely and properly than they could be prescribed in advance. We can now only declare the views which influence us in passing upon this motion. It is sufficient here to hold that proceedings to restrain municipal undertakings or municipal taxation, in ordinary cases, belong appropriately to the original jurisdiction of the circuit, and not of this court.

"These are questions *publici juris,* as are title to local public office, performance of local official duty, use of local highways, maintenance of local public buildings, abuse of local power or franchise, and kindred local matters. But these are not generally questions directly involving the sovereign prerogative or the interest of the state at large, so as to call

for the prerogative jurisdiction of this court. As a rule, no extraordinary jurisdiction is necessary or proper for them; the ordinary jurisdiction of the circuit court being ample. Practically it would be impossible to take jurisdiction of them all here; and we intend to assume jurisdiction of none of them, which are not taken out of the rule by some exceptional cause. When they are governed by some peculiarity which brings them within the spirit and object of the original jurisdiction of this court, we will entertain them. Otherwise they will be left to the circuit courts. And this we understand to be the true spirit and order of the constitutional grant of jurisdiction."

In this case also was laid down the general principle that, while jurisdiction would never be assumed to enforce a mere private right, still jurisdiction would not be refused because there might be a private relator in the case who possessed a private interest bound up with the public interest, if in fact there was the necessary public interest before defined; and that the court in rendering judgment in such a case would not ignore the private interest of the relator, but administer full relief; but, on the other hand, if the private right of a relator and the public right of the state met in the same litigation, the private right of the relator might entirely disappear, and the relator drop out, but the court would still proceed and vindicate the public right, if there be a public right separable and distinct from the private right. This doctrine was more fully elaborated and stated in *State ex rel. Drake v. Doyle,* 40 Wis. 175, which will be referred to later in this opinion.

The *Railroad Cases* and the *Eau Claire Case,* taken together, harmoniously following and more fully developing the great idea first announced in general terms by Judge SMITH in the *Blossom Case,* may be truly said to have established the fundamental reason for the existence of the original jurisdiction of this court, and the limits within which, in view of that reason, the court would endeavor to confine its exercise. No attempt was made in either case to mark out or define in advance the particular questions or kinds of questions which

would be considered as affecting the "sovereignty of the state, its franchises or prerogatives, or the liberties of its people." Such an attempt would manifestly have been as unwise as it would have been futile; human prescience is not equal to such a task. So the court wisely contented itself with announcing the general principle, leaving itself free to judge in each case whether the contingency which justified and required the use of the jurisdiction had arisen. Since the decision of those cases this court has faithfully endeavored to follow the general rules laid down in them. Numerous applications for the exercise of the original jurisdiction have been made, and of these many have been granted and some have been refused. The question of the application of the general rules aforesaid has arisen and been discussed and decided in a number of cases presenting widely different problems. Sufficient time has now elapsed so that it should be possible to draw from these decisions some general conclusions as to the limits of the jurisdiction as the court has administered it. If this can be done it certainly ought to be helpful in the future administration of the jurisdiction, not because it will or can put up the bars so that no future case can be brought within the jurisdiction unless it has its prototype in the past, but because every discussion and ruling upon the question as a new case is presented should be helpful in developing some philosophical and orderly rules for the application of the general abstract principles laid down in the two cases last named to concrete cases as they arise in the future.

With this idea in mind a brief review of the significant cases decided since the decisions in the *Railroad Cases* will now be undertaken, and an attempt will be made to classify them.

1. The most numerous cases probably are the *habeas corpus* cases, and they may well be first disposed of. The first of these cases where the question of the jurisdiction was discussed was the *Pierce Case* (*In re Pierce,* 44 Wis. 411),

where, in spite of the vigorous protest of Chief Justice RYAN, it was held that the state had so vital an interest in the liberty of every one of its citizens that the question whether a citizen was unlawfully deprived of that liberty involved the interest of the public at large. The reasoning by which the unlawful imprisonment of a single citizen is held to involve the interests of the public at large, so as to justify the use of the original jurisdiction of the supreme court, may seem somewhat strained, but the decision has been followed without question in numerous cases since that time, and furthermore it is to be noticed that the legislation of the state from the earliest days of the state had provided for the issuance of the writ by any justice of the supreme court, and by ch. 45 of the Laws of 1864 had further provided that all applications for the writ on behalf of a person confined in the state prison must be made to the supreme court or one of the justices thereof. This latter provision has remained upon the statute book ever since (sec. 3409, Stats. 1898), and this court has held that it applies to applications made by persons confined upon conviction for felony in the Milwaukee house of correction as well. *State ex rel. Heiden v. Ryan,* 99 Wis. 123, 74 N. W. 544. It does not seem necessary or useful to cite the numerous *habeas corpus* cases which have been entertained by this court since the *Pierce Case.*

2. Next may be considered the *quo warranto* cases, and of these we have found but five cases which seem of any significance, namely: *State ex rel. Wood v. Baker,* 38 Wis. 71; *Att'y Gen. v. West Wis. R. Co.* 36 Wis. 466; *State ex rel. Att'y Gen. v. M., L. S. & W. R. Co.* 45 Wis. 579; *State ex rel. Radl v. Shaughnessey,* 86 Wis. 646, 57 N. W. 1105; and *In re Holland,* 107 Wis. 178, 83 N. W. 319.

The first of these cases was brought to try the title to the office of county clerk, and it was held that contests concerning the title to county offices were not within the jurisdiction marked out for itself by the court in the *Railroad Cases,* but

that because the title of the judge of the circuit court to the office of Congressman depended on the same votes which were questioned in the case, and hence he could not with propriety sit, the case came within the exception suggested in the *Eau Claire Case,* namely, cases where the ordinary jurisdiction of the circuit is entirely inadequate. The evident meaning of this case is that contests over local offices will not be entertained unless the situation be such that the remedies in local courts are absolutely inadequate. It may well be doubted whether such a case as the *Wood Case* would now be entertained, in view of the ease with which under present laws another judge can be at once called in to try a case where the circuit judge is disqualified or declines to sit. The second and third cases named were actions brought to forfeit corporate charters granted by the state to railroad companies, because of breach of duty on the part of the companies. They unquestionably fall within the jurisdiction as defined in the *Railroad Cases,* for in such an action the state is suing to punish the abuse or misuse of *franchises* granted by it in its sovereign capacity. In this connection it is pertinent to note that the legislature, by secs. 3240 *et seq.* of the statutes (R. S. 1878 and Stats. 1898), has for many years provided for actions in the name of the state to vacate corporate charters, which may be brought either in the supreme or circuit court, as this court may direct. See *State ex rel. Lederer v. Inter-National Inv. Co.* 88 Wis. 512, 60 N. W. 796. In the *Shaughnessey Case* it was sought to use the original jurisdiction of this court to try the title to the office of justice of the peace, and jurisdiction was declined on the ground that it was a local matter purely, which did not affect the state at large. For the same reason jurisdiction was declined in the *Holland Case,* in which it was sought to test the validity of the incorporation of a village.

3. Next may well be classed the two great cases of *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, and *Att'y Gen. v. Eau*

Claire, 37 Wis. 400, in the first of which the state sued to prevent the great public-service corporations of the state from systematically violating and defying laws regulating their rates in the interest of the whole people, which laws were in effect amendments to the corporate charters of the companies; and in the second of which the state sued to prevent a pourpresture in one of the great navigable rivers of the state connecting with the Mississippi river, which the state is bound to keep open as a common highway to the people of this state and of the United States. Upon the same general ground this court later entertained an action on the relation of the attorney general to prevent the tearing up of a railroad, the idea being that a railroad operated under a franchise granted by the state is a state highway whose destruction affects the interests of the state at large. *State ex rel. Att'y Gen. v. Frost,* 113 Wis. 623, 88 N. W. 912, 89 N. W. 915. The great public interests involved in these cases are so apparent as to obviate the necessity of comment upon them. In the case of *State v. St. Croix B. Corp.* 60 Wis. 565, 19 N. W. 396, however, the court declined jurisdiction of a case very similar to the *Eau Claire Case,* because the St. Croix river was a river on the boundary of the state, as to which the state was under no trust to keep it open.

4. In the next class may be placed the cases where it has been sought by *mandamus* or mandatory injunction to compel a state officer to perform a ministerial duty. Under this head the cases involving performance of important duties imposed on state officers by the general election laws form a striking group, the first of these cases being the case of *State ex rel. McDill v. State Canvassers,* 36 Wis. 498, where *mandamus* was sought to compel the state board of canvassers to declare a certain result from the returns of a Congressional election, and the court deemed the case one wherein the original jurisdiction should be exercised, although the office in issue was in a sense local, because the circuit judge himself was the op-

posing candidate and could not act judicially upon such a question, hence the remedy in the circuit court was utterly inadequate. It is instructive to note that after this decision, by ch. 231 of the session laws of 1880, the legislature passed an act regulating the procedure in *mandamus* cases brought in the supreme court against *any* board of canvassers to compel the delivery of a certificate of election to either of the offices of member of the legislature, congressman, or presidential elector, thus apparently giving the legislative sanction to the idea that controversies concerning the canvass of votes at general elections for either of such offices so far affected the prerogatives of the state or the liberties of the people, or both, as to come fairly within the original jurisdiction of the court. The substance of this provision has ever since remained a part of the *mandamus* statute. Sec. 3452, Stats. (1898). Other cases where the original jurisdiction has been invoked to compel the performance of official duty imposed by general election laws are the cases of *State ex rel. Kustermann v. Board of State Canvassers,* 145 Wis. 294, 130 N. W. 489; *State ex rel. Cook v. Houser,* 122 Wis. 534, 100 N. W. 964; *State ex rel. Bancroft v. Frear,* 144 Wis. 79, 128 N. W. 1068; and *State ex rel. Rinder v. Goff,* 129 Wis. 668, 109 N. W. 628. The first of these last named actions was practically the same as the *McDill Case,* the second and third were cases involving the duty of the secretary of the state, under general election laws, to place the names of certain persons upon the official ballot as nominees of a great political party for state offices, and the *Rinder Case* was a very good example of the exceptional cases where, though the office in issue was purely local, jurisdiction was assumed because of the absolute inadequacy of the remedy in the lower courts, and the abstract question involved was a question affecting the interests of the entire public.

Another group of significant cases under the fourth head are the *mandamus* actions brought to compel payment of

funds from the state treasury to the persons or corporations alleged to be entitled thereto by law. In this group fall *State ex rel. Bell v. Harshaw,* 76 Wis. 230, 45 N. W. 308, brought to compel the state treasurer to pay over certain moneys in the state treasury to certain counties; *State ex rel. New Richmond v. Davidson,* 114 Wis. 563, 88 N. W. 596, 90 N. W. 1067, brought to compel the state treasurer to pay over to the city of New Richmond an appropriation made by the legislature on account of damages suffered by the city in a cyclone; *State ex rel. Garrett v. Froehlich,* 118 Wis. 129, 94 N. W. 50, brought to compel auditing of claims against the state for the Keeley treatment of drunkards at private sanitariums; *State ex rel. Buell v. Frear,* 146 Wis. 291, 131 N. W. 832, brought to compel auditing of salaries of the civil service commission and its employees; and *State ex rel. Bashford v. Frear,* 138 Wis. 536, 120 N. W. 216, brought to compel auditing of the salary of a justice of this court.

Under this head also naturally fall the cases involving the issuance or revocation of licenses and patents, and of these the case of *State ex rel. Drake v. Doyle,* 40 Wis. 175, is the most significant. Here *mandamus* was invoked against the secretary of state upon the mere relation of a private individual in order to compel that officer to revoke the license of a foreign insurance company because it had committed an act which, under the state law, worked a forfeiture of its license. In this case the attorney general appeared for the secretary of state, and suggested that the relator's personal grievance had been settled; nevertheless the action went on *as the suit of the state* to vindicate and preserve "the prerogatives of the state in its sovereign character" (page 186), and a peremptory *mandamus* was awarded.

Other cases of this general nature are *State ex rel. Anderson v. Timme,* 60 Wis. 344, 18 N. W. 837, brought to compel the issuance of a patent by the commissioners of public lands; *State ex rel. Abbot v. McFetridge,* 64 Wis. 130, 24 N. W.

140, to compel issuance of a license to a railroad company to do business, on the allegation that it had fully paid the legal license fees; also the case of *State ex rel. Covenant Mut. Ben. Asso. v. Root,* 83 Wis. 667, 54 N. W. 33, brought to compel the state insurance commissioner to issue a license to a foreign insurance company which had fully complied with the law. This last case, however, was directly overruled in the case of *In re Court of Honor,* 109 Wis. 625, 85 N. W. 497, where this court refused to entertain an exactly similar action, on the ground that the primary right sought to be vindicated was private, and the public right, if involved at all, was only incidentally affected, and hence the circuit court was the appropriate tribunal to pass on the question in the first instance. Whether this ruling does not in effect negative jurisdiction in the *Timme* and *McFetridge Cases* just cited may be a question of some doubt, but it is not necessary to determine it here. The case of *State ex rel. Guenther v. Miles,* 52 Wis. 488, 9 N. W. 403, where the original jurisdiction was used on the relation of the state treasurer to compel a county treasurer to make an official return, is not significant, as the question of jurisdiction was not raised.

5. In the last class fall the cases where it is sought to restrain a state officer (and in exceptional cases a county officer) from committing an unlawful act which will affect the prerogatives or sovereignty of the state or the liberties of the people. The most conspicuous examples in this class of cases are the so-called "Gerrymander cases" (*State rel. Att'y Gen. v. Cunningham,* 81 Wis. 440, 51 N. W. 724, and *State ex rel. Lamb v. Cunningham,* 83 Wis. 90, 53 N. W. 35), the first of which was brought by the attorney general himself, and the second by a private relator on leave of the court, after the attorney general had refused to act. In these cases it was sought to enjoin the secretary of state from carrying out the terms of an apportionment law, on the ground that the law violated the commands of the constitution and was void.

Here for the first time this court held that it could and would, on the relation of a private citizen, prevent a state officer from enforcing an unconstitutional law which injuriously affected the liberties of the people, as an unfair and unconstitutional division of the legislative election districts of the state must necessarily do. In neither of these cases was jurisdiction sustained because of the alleged unlawful expenditure of public funds, nor because of the fact that the relator was a taxpayer, but in both the ground was that an injury to the people of the state was about to be committed by depriving many voters of their just and constitutional rights in the election of the legislative bodies of the state under the form of a law which violated the express command of the constitution. The evident idea was that the relator was in no sense the plaintiff; he simply brought the matter to the attention of the court, and when he had performed this function he ceased to be of importance,—the suit became from its inception the suit of the state to vindicate the liberties of its people generally.

Following these cases at a considerable distance in time, but practically identical in principle, are the so-called "Twenty per cent." cases (*State ex rel. McGrael v. Phelps,* 144 Wis. 1, 128 N. W. 1041, and *State ex rel. Hanna v. Frear,* 144 Wis. 58, 128 N. W. 1061), where, on the relation of private individuals, state and county officers were sought to be enjoined from enforcing a law requiring that in order to be represented on the official ballot a political party must cast at the primary twenty per cent. of its vote for governor at the last preceding general election. The ground taken was that this provision was an unreasonable, unconstitutional restriction or infringement on the freedom of the ballot, and hence it affected the liberties of the people. Although objection to the jurisdiction was formally taken in these cases, it was not pressed, it was not discussed, and the court simply said that it saw no reason why jurisdiction should not be exercised.

In this class, if anywhere, must naturally fall the case of *State ex rel. Raymer v. Cunningham,* 82 Wis. 39, 51 N. W. 1133, which has been previously cited, brought on the relation of a taxpayer to prevent the payment of salary to a state officer over and above the amount limited by the constitution. As has been before said in this opinion, the jurisdiction in that case was sustained by brief reference to the first gerrymander case, which is quite plainly a different case. Unquestionably the real ground was that the legislature was by express command of the constitution prohibited from paying to the state superintendent out of the state funds any sum exceeding $1,200 per annum; hence the law attacked in that case, which directed payment of a greater sum every year, was absolutely void, and the state itself was entitled to the intervention of the extraordinary jurisdiction of this court to protect itself from unconstitutional and unlawful depletion of its treasury by its own officers.

In both the *Rosenhein Case* (*State ex rel. Rosenhein v. Frear,* 138 Wis. 173, 119 N. W. 894) and the *Filer & Stowell Co. Case,* 146 Wis. 629, 132 N. W. 584, the applications to bring actions on the relation of taxpayers were denied, because it was considered in each case that no unlawful expenditure of funds by state officers was threatened, but in the first named case it was expressly said, and in the second it was assumed, that in order to prevent illegitimate expenditure of state funds an equitable action on the initiative of a taxpayer, after refusal by the attorney general, would be properly within the original jurisdiction of this court.

There are several other cases which have more or less bearing on the general question which will be briefly mentioned. In the case of *In re Hartung,* 98 Wis. 140, 73 N. W. 988, it was sought to use the original jurisdiction of this court by way of injunction to put an end to a public nuisance in the town of Wauwatosa, consisting of the depositing of garbage on the surface of land to the discomfort of a very large neigh-

borhood, but it was held that such a wrong, though public, was not a wrong affecting the sovereignty, franchises, or prerogatives of the state, or the liberties of the people at large, and that the remedy was in the local courts. This seems to be an entirely logical application of the general principle laid down in the *Railroad Cases,* that even though a question be *publici juris* it will not call for the use of the original jurisdiction if it be merely local in its effect.

The sequel to this case, which appears by reference to *State ex rel. Hartung v. Milwaukee,* 102 Wis. 509, 78 N. W. 756, is also instructive. After the decision in *In re Hartung, supra,* the relator went to the circuit court and, after refusal by the attorney general, was allowed to bring an action in the circuit court in the name of the state to enjoin the further continuance of the alleged public nuisance. The case was tried on the merits and an injunction refused, and on appeal to this court it was held that the circuit court was not given the writ of injunction for prerogative purposes, as this court was, and that hence the action below was never in fact an action by the state, notwithstanding its title, but was an action by a private party.

In view of this last named decision, the recent case of *State ex rel. Van Alstine v. Frear,* 142 Wis. 320, 125 N. W. 961, becomes interesting, if not important. This case was an action brought in the circuit court in the name of the state, after refusal to act by the attorney general, upon the relation of a taxpayer, the object being to enjoin the secretary of state and state treasurer from carrying out the provisions of the primary election law, and especially from auditing or paying claims or bills for expenses arising under the law, on the ground of unconstitutionality of the law. The jurisdiction of the circuit court in this case was not challenged by demurrer, nor was it raised or considered either in the lower court or in this court, yet it seems quite manifest that it was a case where injunction was used in the circuit court for pre-

rogative purposes, contrary to the principle laid down in the case of *State ex rel. Hartung v. Milwaukee,* just cited. However, as the question of jurisdiction passed *sub silentio,* the case is not significant.

Before proceeding to draw general conclusions from these decisions as to the field of the original jurisdiction, so far as any field has been marked out by the decisions, it may be well, in order to avoid misapprehension, to notice the fact that the legislature by sec. 3200, Stats. (1898), has consented that the state may be sued in the supreme court by any person having a just claim which has been disallowed by the legislature. Actions brought under this section are, of course, brought by virtue of the consent of the state, without which the sovereign itself cannot be sued. Nothing said in this opinion is to be construed as having any bearing on this section or the actions brought under it.

The affirmative result of the significant cases since the *Railroad Cases* is, as it seems to us, that the original jurisdiction of this court may be rightly invoked when there is a showing made either that (1) a citizen is wrongfully deprived of his liberty; (2) a state office has been usurped; (3) a franchise grantable only by the state has been usurped, abused, or forfeited; (4) a law regulating public-service corporations in the interest of the people is systematically disobeyed and set at naught; (5) a navigable river, which the state is bound to keep open as a highway for all, is obstructed or encroached upon, or a public railroad built under a charter granted by the state is about to be destroyed; (6) a state officer declines to perform a ministerial duty, in the performance of which the people at large have a material interest; (7) a state officer is about to perform an official act materially affecting the interests of the people at large, which is contrary to law or imposed upon him by the terms of a law which violates constitutional provisions; or (8) the situation is such, in a matter

publici juris, that the remedy in the lower courts is entirely lacking or absolutely inadequate, and hence jurisdiction must be taken or justice will be denied. It is not meant by this attempted classification that no cases which do not fall within one or the other of the classes can ever call for the exercise of the original jurisdiction, but simply that cases falling within these general classes have been held to be properly within the original jurisdiction.

In addition to these eight affirmative propositions the decided cases justify the statement of several negative propositions which are also helpful upon the general question. These are (1) a case, although involving a question *publici juris,* will not come within the jurisdiction if it be only local in its effect, subject only to the exception named in the eighth class; (2) a case involving a mere private interest, or one whose primary purpose is to redress a private wrong, will not be entertained; (3) a case will not be dismissed, however, because there is a private interest involved with the public interest, provided the private interest be incidental merely, and the vindication of the public right be the primary purpose of the action; (4) an action involving a private as well as a public interest will not be dismissed merely because the private interest may drop out, provided the public and private interests be severable and the public interest still exists; (5) the constitution has not given the circuit court the power to use the writ of injunction as a prerogative jurisdictional writ, as it has been given to the supreme court, hence the circuit court has not the power, in an action not brought by the attorney general but on the relation of a private citizen only, to use the writ for prerogative purposes.

It seems to us now that the real fundamental philosophy of the original jurisdiction and its use has not been at all times fully apprehended by the court, even since the elaborate discussion in the *Railroad* and *Eau Claire Cases,* but after this

review of the authorities it seems quite simple, and it really comes down to a few propositions which when thoroughly understood solve many difficulties.

This transcendent jurisdiction is a jurisdiction reserved for the use of the state itself when it appears to be necessary to vindicate or protect its prerogatives or franchises or the liberties of its people; the state uses it to punish or prevent wrongs to itself or to the whole people; the state is always the plaintiff and the only plaintiff, whether the action be brought by the attorney general, or, against his consent, on the relation of a private individual under the permission and direction of the court. It is never the private relator's suit; he is a mere incident; he brings the public injury to the attention of the court, and the court, by virtue of the power granted by the constitution, commands that the suit be brought by and for the state. The private relator may have a private interest which may be extinguished (if it be severable from the public interest), yet still the state's action proceeds to vindicate the public right. The fact that in many cases, as for example cases of unlawful imprisonment, the private wrong and the public wrong are so closely identified that the ending of the private wrong necessarily puts an end to the public wrong makes no difference with the principle.

These propositions, if correct, and we believe they are, demonstrate very clearly that there can be no such thing as a taxpayer's action (as that action is known in the circuit courts) brought in the supreme court within the original jurisdiction. The philosophy of the taxpayer's action in the circuit court is that the taxpayer is a member of a municipal corporation, who, by virtue of his contributions to the funds of the municipality, has an interest in its funds and property of the same general quality as the interest of a stockholder in the funds of a business corporation, and hence when corporate officers are about to illegally use or squander its funds or property he may appeal to a court of equity on behalf of him-

self and his fellow stockholders (*i. e.* taxpayers) to conserve and protect the corporate interests and property from spoliation by its own officers.

The taxpayer himself is the actual party to the litigation, and represents not the whole public, nor the state, nor even all the inhabitants of his municipality, but a comparatively limited class, namely, the citizens who pay taxes. In short, he sues for a class.

No such thing is known in the exercise of the original jurisdiction of this court. In actions brought within that jurisdiction the state is the plaintiff and sues to vindicate the rights of the whole people.

The *Bolens* case cannot, therefore, be held to come within the original jurisdiction of this court, if it be a mere taxpayer's action.

This conclusion, however, by no means leads to the result that the original jurisdiction may not properly be used at the instance and upon the relation of a private individual to stay by appropriate writ the expenditure of the state's funds for purposes expressly or by necessary implication forbidden by the constitution. Such use of funds by a state officer is certainly as much a breach of duty and an injury to the state as the refusal to pay out funds which have been lawfully appropriated, or the failure to obey the provisions of general election laws, but in such case the action is the action of the state as truly as if brought by the attorney general, not the action of the tax-paying relator.

If this be true, we can see no logical escape from the conclusion that, where state officials are about to spend the state's money in executing an unconstitutional law, the state may prevent the threatened misapplication of its funds by the same means. This seems to us the only logical basis upon which the case of *State ex rel. Raymer v. Cunningham,* 82 Wis. 39, 51 N. W. 1133, can rest.

But it must be recognized that such a power is extreme.

To arrest the hand of a state officer as he is about to carry out the command of the legislature is indeed a serious step, one not to be taken summarily or without profound consideration. As the power is great, it should be exercised with a wisdom and discretion commensurate with its greatness. No trivial grounds should impel the court to permit its exercise. This court will certainly not feel obliged in every case where there is a threatened expenditure of state funds under a law of doubtful constitutionality to allow an action of this nature to be brought in the name of the state, but will feel entirely free to leave the question of constitutionality to be settled as it may arise in ordinary litigation. The defiance of express or implied constitutional commands may be so flagrant and patent as to make the exercise of this great power appear justifiable, if not absolutely necessary, and in such case it will be exercised courageously. This court will, however, judge of the exigency in each case as it arises, and will endeavor to guard the great power from being used in trifling cases or to accomplish ulterior purposes.

In the present case we go no further than to state these general principles. We do not find it necessary to decide whether the alleged illegal expenditure of funds alone presents a case of such exigency as to justify the use of the original jurisdiction of this court to prevent such expenditure. There are other and more important features in the present case which in our judgment present a proper case for the exercise of the original jurisdiction.

The law which is attacked here, if it be valid, makes a radical change in the present system of taxation over the whole state.

Since the days when Hampden refused to pay the ship money, unjust taxation has been deemed by English-speaking nations, at least, to vitally concern, if not to destroy, the liberties of the people. Such taxation has been deemed to justify armed resistance and, if need be, revolution. Insistence

upon it cost Charles I. his life and England an empire. If this law in its essential provisions violates constitutional provisions and hence is void, taxation under it is, of course, unjust, and the sums which may be collected under it are unlawfully collected. It makes in terms a very sweeping change in the methods of taxation in every taxing district of the state, and shifts the burdens of taxation so that many will pay more than under the old system, while many will pay less. If it should go into operation for a year or two and then be held unconstitutional in some actual case, the confusion created in the financial affairs of the state and of every municipality would unquestionably be great. We cannot but regard any serious question as to the constitutionality of such a law as a question seriously affecting the prerogatives of the state, as well as the liberties of the people, hence we conclude that the case presented is one justly calling for the exercise of the original jurisdiction of this court.

Many provisions of the law are attacked as offending against either the federal or the state constitution. We shall only treat the contentions which might from some point of view be considered as going to the validity of the whole act. As to those minor provisions which are properly to be regarded as matters of detail, we shall express no opinion. This is in accord with our well established custom in cases of this nature. *Wadhams Oil Co. v. Tracy,* 141 Wis. 150, 123 N. W. 785; *State ex rel. Buell v. Frear,* 146 Wis. 291, 131 N. W. 832; *Borgnis v. Falk Co.* 147 Wis. 327, 133 N. W. 209.

A few general observations may not be out of place before taking up for consideration the specific claims of unconstitutionality which are urged upon our attention.

The law in question, if valid, works a very important change in the general taxation policy of the state. Ever since the foundation of the state government it has been the policy of the state to levy its general taxes upon property

either real or personal, with the exception of the inheritance taxes and the license taxes first levied on railroads and latterly upon other public-service corporations. The constitution of the state, though not forbidding excise taxation, as determined in the inheritance tax case (*Nunnemacher v. State,* 129 Wis. 190, 108 N. W. 627), contained only one brief section on the general subject of taxation, namely, sec. 1 of art. VIII, reading as follows: "The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." Under this section property taxation has been the rule, with the exceptions just noted, until the passage of the present law. This law, however, is but the concrete embodiment of a popular sentiment which has been abroad for some time. The legislatures of 1905 and 1907 passed a resolution recommending the amendment of the section of the constitution quoted, by the addition of the following words: "Taxes may also be imposed on incomes, privileges, and occupations, which taxes may be graduated, and progressive and reasonable exemptions may be provided." This change was ratified by the people at the general election held in November, 1908, and thus was clearly expressed by both legislature and people the idea that some form of general taxation in addition to, or in place of, property taxation might well be adopted. The attempt has now been made to carry out this idea, and we have the result before us in the present law. With the political or economic policy or expediency of the law we have nothing to do. If it be within constitutional lines, it represents and embodies public policy, because it is enacted by that branch of the government which determines public policy.

It may be well to note, however, that income taxation is no new and untried experiment in the field of taxation. It has been in use in various forms, and generally with the progressive feature, by many of the civilized governments of the world for decades, which in some instances run into centu-

ries. It has been used at various times by nearly or quite twenty of our own states, and is now in use in several of them. It was used for a brief period by the government of the United States, and is now in successful operation in practically all of the great nations of the civilized world except the United States. The fundamental idea upon which its champions rest their argument in its favor is that taxation should logically be imposed according to ability to pay, rather than upon the mere possession of property, which for various reasons may produce no revenue to the owner.

It is argued that there should be as nearly as practicable equality of sacrifice among the various taxpayers, and that a tax levied at an uniform or proportional rate can rarely, if ever, produce equality of sacrifice; that one per cent. of a small income, which just suffices to support its owner, is a far larger relative contribution to the public treasury than one per cent. of an income so large that it cannot be exhausted by its owner except by means of lavish and extravagant expenditures.

We are not to be understood by these remarks to be advancing arguments in support of the policy or expediency of the law, but simply as showing that in passing the law the legislature is only adopting a scheme of taxation which has been approved for many years by many of the most enlightened governments of the world, and has the sanction of many thoughtful economists.

By the present law it is quite clear that personal property taxation for all practical purposes becomes a thing of the past. The specific exemptions of all money and credits and the great bulk of stocks and bonds, as well as of all farm machinery, tools, wearing apparel, and household furniture in actual use, regardless of value, goes far to eliminate taxation of personal property; while the provision that he who pays personal property taxes may have the amount so paid credited on his income tax for the year seems to put an end to any effective

taxation of personal property. That taxation of such property has proven a practical failure will be admitted by all who have given any attention to the subject. Doubtless this was one of the main arguments in the legislative mind for the passage of the present act. By this act the legislature has, in substance, declared that the state's system of taxation shall be changed from a system of uniform taxation of property (which so far as personal property is concerned has proven a failure) to a system which shall be a combination of two ideas, namely, taxation of persons progressively, according to ability to pay, and taxation of real property uniformly, according to value.

We pass from these general observations to consideration of the specific grounds of unconstitutionality alleged.

1. It is first claimed with much earnestness and ability that the act violates the provisions of the XIVth amendment to the federal constitution. One of the contentions under this head is that the progressive features of the act are discriminatory, if not absolutely confiscatory. Another contention is that the act provides for double taxation, and for both reasons it is claimed that it denies to citizens the "equal protection of the laws."

It is said in support of this contention that the United States supreme court in the *Pollock Case* (*Pollock v. Farmers' L. & T. Co.* 157 U. S. 429, 15 Sup. Ct. 673) has held that taxation of income derived from land is in fact taxation of the land itself, hence that the act provides for double taxation, first of the land *in specie,* and next of the income therefrom. It seems that this claim may be very easily met. The question in the *Pollock Case* was whether the taxation of rentals of land was direct taxation within the meaning of that term as used in the constitution of the United States, and it was held to be the same, in substance, as a tax on the land itself, and hence a direct tax. This may be admitted for the purposes of the case, but it does not appear to in any way decide the question here at issue, or even to be very persua-

sive. The question there was of the power of Congress under that clause of the federal constitution which forbids any direct federal tax except one levied in proportion to the population. The question here is primarily of the power of the legislature of Wisconsin under its constitution to levy an income tax in addition to a real-estate tax, and, secondarily, whether such a tax denies to any one the equal protection of the laws.

The inapplicability of the rule of the *Pollock Case* to the case here presented seems so plain as to require little comment. There can be no doubt of the proposition that income taxation of a progressive character, in addition to taxation of property, is directly authorized by the constitution of Wisconsin, as amended in 1908. Words could hardly be plainer to express that idea than the words used. From them it clearly appears that taxation of property and taxation of incomes are recognized as two separate and distinct things in the state constitution; both may be levied, and lawfully levied, because the constitution says so. However philosophical the argument may be that taxation of rents received from property is in effect taxation of the property itself, the people of Wisconsin have said that "property" means one thing, and "income" means another; in other words, that income taxation is not property taxation, as the words are used in the constitution of Wisconsin.

That they may say so and lawfully say so there is no doubt, unless some restriction in the federal constitution is thereby violated, and we are pointed to none, save the clause guaranteeing "equal protection of the laws." That this clause does not apply to the case seems very well settled by the language of the supreme court of the United States itself in the great case of *Mich. Cent. R. Co. v. Powers,* 201 U. S. 245, at pages 292, 293, 26 Sup. Ct. 459, where it is said:

"There is no general supervision on the part of the nation over state taxation, and in respect to the latter the state has, speaking generally, the freedom of a sovereign both as to ob-

jects and methods. It was well said by Judge WANTY, delivering the opinion of the circuit court in this case (p. 232):

" 'There can at this time be no question, after the frequent and uniform expressions of the federal supreme court, that it was not designed by the XIVth amendment to the constitution to prevent a state from changing its system of taxation in all proper and reasonable ways, nor to compel the states to adopt an ironclad rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice.' "

This doctrine has been stated and restated in many forms, but with substantially the same meaning, in many federal cases, beginning with the case of *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S. 232, 10 Sup. Ct. 533, nearly all of which are cited in the *Powers Case* at the close of the clauses above quoted. It seems unnecessary to quote or descant upon them. The sum and substance of it is that the XIVth amendment never was intended to lay upon the states an unbending rule of equal taxation; the states may make exemptions, levy different rates upon different classes, tax such property as they choose, and make such deductions as they choose, and, so long as they obey their own constitutions and proceed within reasonable limits and general usage, there is no power to say them nay. With regard to the progressive feature, it is aptly said in *Knowlton v. Moore,* 178 U. S. 41, at page 109, 20 Sup. Ct. 747, by the present chief justice, that "taxes imposed with reference to the ability of the person upon whom the burden is placed to bear the same have been levied from the foundation of the government. So, also, some authoritative thinkers, and a number of economic writers, contend that a progressive tax is more just and equal than a proportional one. In the absence of constitutional limitation, the question whether it is or is not is legislative and not judicial."

No more need be said as to the progressive feature. Expressly permitted as it is by our own constitution, and clearly not within the inhibitions of the XIVth amendment, the progressive feature is in no respect objectionable.

It was suggested in the *Knowlton Case, supra,* that possibly the case might arise where exactions so arbitrary and confiscatory might be imposed under the guise of progressive taxation that the question would arise whether judicial power should not afford relief under inherent and fundamental principles of justice; but as there is plainly no ground for such a contention here, there is no need of considering the question.

2. It is argued that the provisions which deny to nonresidents the exemptions which are allowed to residents, and which allow the board of review to increase the assessment of a nonresident without notice, while requiring notice to be given to a resident, violate sec. 2 of art. IV of the federal constitution, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The question as to the validity of the provision allowing exemptions to residents of the state and denying them to nonresidents is raised, and receives some attention in the briefs, but was not mentioned in the oral arguments. We regard it as a question involved in considerable doubt, and one not necessary to be passed upon now. It cannot be imagined for a moment that the legislature would have failed to pass the act had it not contained this provision, and we prefer to wait until the question is presented in a concrete case, at which time there will be opportunity to fully consider it after comprehensive briefs and arguments. It seems that the supreme court of the United States decided in *Ward v. Maryland,* 12 Wall. 418, at page 430, that one of the privileges and immunities protected by the section quoted is the right "to be exempt from any higher taxes or excises than are imposed by the state upon its own citizens." Other decisions relied on upon the same side are *In re Stanford's Es-*

tate, 126 Cal. 112, 54 Pac. 259, 58 Pac. 462, and *Sprague v. Fletcher,* 69 Vt. 69, 37 Atl. 239, 37 L. R. A. 840, and the cases cited in the latter case. On the other side reliance is placed on the analogy of the laws providing for exemptions from execution seizure, which confine their benefits to residents, and upon *Travellers' Ins. Co. v. Connecticut,* 185 U. S. 364, 22 Sup. Ct. 673.

So far as the provision allowing the increasing of an assessment against a nonresident without notice is concerned, this would seem to be almost a necessity if power to increase the assessment of a nonresident is to be given to the board at all, otherwise the nonresident would only need to stay out of the state to prevent the possibility of an increase of his assessment. We do not consider that this latter provision affects in any way the privileges or immunities which are covered by the constitutional provision cited.

3. The claim is made that the law violates the constitutional guaranties of local self-government, by placing the power of appointment of the various assessors of incomes in the state tax commission.

These guaranties in substance are (1) that all county officers, except judicial officers, shall be chosen by the electors of the county every two years (sec. 4, art. VI, Const.); (2) that all county officers whose election or appointment is not provided for by the constitution itself shall be elected by the electors or appointed by the proper county authorities, as the legislature shall direct; (3) that all city, town, and village officers whose election or appointment is not provided for by the constitution shall be elected by the electors of the proper municipality or appointed by such municipal authorities as the legislature shall designate; (4) that all other officers whose election or appointment is not provided for by the constitution, and all officers whose offices may thereafter be created by law, shall be elected by the people or appointed as the legislature may direct. Sec. 9, art. XIII, Const. These provisions have been quite fully considered and expounded by

this court in several cases, and it seems unnecessary to add to the quite complete discussions of the subject to be found in *O'Connor v. Fond du Lac,* 109 Wis. 253, 85 N. W. 327, and *State ex rel. Gubbins v. Anson,* 132 Wis. 461, 112 N. W. 475.

It is sufficient to say that we do not regard the office of assessor of incomes, as provided for by this act, as either a county, city, town, or village office, nor do we regard it as an office existing in substance at the time of the adoption of the constitution, or essential to the existence or efficiency of either of said municipal divisions of the state, but rather an entirely new office within the fourth class above named, whose election or appointment may be provided for in any way that the legislature may in its discretion direct.

The further contention is made that it is a delegation of legislative power to vest in the state tax commission the power of appointing assessors of incomes and fixing their salaries. This objection is met and fully answered in *State ex rel. Gubbins v. Anson, supra,* and in the *Revisor's Case* (*In re Appointment of Revisor of Statutes*) 141 Wis. 592, 124 N. W. 670.

4. A number of contentions are made with regard to the exemption features of the act, and, first, it is said under this head that the allowance of exemptions to individuals and the denial of them to partnerships is unjust discrimination. The question depends, of course, upon whether there is any valid ground for classification. Is there such a substantial difference between the classes as to reasonably suggest or call for the propriety of different treatment? We are clearly of opinion that this question must be answered in the affirmative. A partnership ordinarily has certain distinct and well known advantages in the transaction of business over the individual, arising from the fact that it allows a combination of capital, brains, and industry, and thus makes it possible to accomplish many things which an individual in the same business cannot accomplish. Further than this, however, there is another

consideration. If the partner have individual income from other sources than the partnership business (as many do), his exemptions will be allowed to him out of the individual income, and thus, if he were also allowed exemptions from the partnership income, he would be allowed double exemptions. Altogether there seems to be ample reason for the classification. The exemptions themselves do not seem to be seriously attacked, nor do we see any reason why they should be. The most striking exemption is that of life insurance to the amount of $10,000 in favor of one legally dependent on the deceased, but while this is somewhat large we cannot say that it is unreasonable, nor that there is not ample ground for classifying legally dependent persons, and extending an exemption to them which is denied to others.

Attack is made upon the provision which directs that a taxpayer who has paid a personal property tax for the year shall be entitled to have the amount so paid credited upon his income tax. There is said to be no just ground for this distinction, but it seems quite clear to us that there is; in fact it seems to be rather a means of equalizing the burden of the new form of taxation than to be really an exemption. It was evidently done with the idea of accomplishing, without too violent a shock to taxing machinery, the substantial elimination of personal property taxation and the substitution therefor of "ability" taxation. The practical result is that the taxpayer who has taxable personal property and the taxpayer who has none each pays taxes according to his ability as evidenced by his income.

In this connection, though not perhaps in its logical order, may be considered the objection to that provision of the act which directs that the estimated rental of residence property occupied by the owner shall be considered as income. It is said that this is not income, and that calling it income does not make it income. It may be conceded that things which

are not in fact income cannot be made such by mere legislative fiat, yet it must also be conceded, we think, that income in its general sense need not necessarily be money. Clearly it must be money or that which is convertible into money. The Century Dictionary defines it as that which "comes in to a person as payment for labor or services rendered in some office, or as gain from lands, business, the investment of capital, etc." The clause was doubtless inserted in an effort to equalize the situation of two men each possessed of a house of equal rental value, one of whom rents his house to a tenant, while the other occupies his house himself. Under the clause in question the two men with like property are placed upon an equal footing, and in no other way apparently can that be done. Under the English income tax laws it has been held that where a man has a residence or right of residence which he can turn into money if he chooses, and he occupies the residence himself, the annual value of the rental forms part of his income. *Corke v. Fry,* 32 Scottish Law Rep. 341. We discover no objection to the provision in question.

Objection is also made to the provision that the income of a wife living with her husband shall be added to the income of the husband, and the income of each child under eighteen years of age living with its parent or parents shall be added to that of the parent or parents. This is another case of classification, and it is only justifiable in case there is some substantial difference of situation which suggests the advisability of difference of treatment. We think there clearly is such a difference, in this, that experience has demonstrated that otherwise there will be many opportunities for fraud and evasion of the law, which the close relationship of husband and wife or parent and child makes possible, if not easy. The temptation to make colorable shifts and transfers of property in order to secure double or even triple exemptions, if there were not some provision of this kind in the law, would unquestion-

ably be very great. There is no such temptation or opportunity in the case of the single man, or the man and wife who are living separately.

One further objection we overrule here without comment, for the reason that it seems very unsubstantial, namely, the objection that the law is retroactive and void, because assessed on incomes received during the entire year 1911, while it did not go into effect until July 15th of that year, and also because it includes profits derived from the sale of property purchased at any time within three years previously.

5. A strong argument is made attacking the validity of sec. 1087*m*—22, which provides in substance that the income of a resident derived from different political subdivisions of the state shall be combined for the purpose of determining the exemptions and the rate, while the income of a nonresident is to be separately assessed and taxed in each of the municipalities from which it is derived. A table is submitted showing that under this rule if A., a resident, derived $1,000 from each of thirteen different towns or cities he will be required to pay a tax of $367, because his income is aggregated, and consequently becomes in large part subject to the higher rates, while if B., a nonresident, receives the same income from the same sources, he will only pay the smallest rate, *i. e.* one per cent. of each $1,000, amounting to only $130. This, it is said, is unjust discrimination against the residents of the state, and deprives them of the privileges and immunities which are granted to the citizens of other states, in violation of the federal constitution. This presents the question whether such a discrimination can be made between residents and nonresidents, only this time the discrimination seems to be against the resident and in favor of the nonresident. This question also we deem one not necessary to be decided now, and we intimate no opinion upon it. It does not seem that the case will frequently arise, but if it does it can be then

treated. We do not regard it as in any respect important in considering the validity of the act as a whole.

6. Much complaint is made of that part of sec. 1087*m*—6 which provides a different rate of taxation for the income of corporations from the rate prescribed for individuals, and this also is said to be unjust discrimination. Again the question is whether there be substantial differences of situation between individuals and corporations which suggest and justify this difference in treatment, and again it seems that the answer must be Yes. The corporation is an artificial creation of the state endowed with franchises and privileges of many kinds which the individual has not. It might be said with truth that the clause could be justified on the ground that it is an amendment to every corporate charter, which the legislature has the undoubted right to make, but it is not necessary to rely on that proposition. The corporate privileges, which are exclusively held by corporations, and the real differences between the situation of a corporation and an individual, among which may be mentioned the fact that the corporation never is obliged to pay an inheritance tax, plainly justify a difference of treatment in the levying of the income tax. Were the income tax a tax upon property, there could be no difference in rate, for taxation of property must still be on a uniform rule, but, as has been heretofore noted, it is not a tax upon property within the meaning of our constitution.

7. The minor objections that the law in terms includes all corporations and does not specifically except national banks, nor name the officers whose salaries cannot be constitutionally taxed, are very easily disposed of. If national banks or any public officers cannot constitutionally be subjected to the tax, the law will be construed as not applying in such cases, just as sec. 1770*b*, Stats. (Laws of 1907, ch. 562), although in general terms covering all business, has been held not to apply to interstate business.

8. We come now to certain serious objections which are made to the provisions of secs. 1087*m*—2, subd. 3, and 1087*m*—3 (b). The first of these sections provides, in substance, that a resident shall be taxed upon all of his income arising from rentals, stocks, bonds, securities, or evidences of debt, whether the same be derived from sources within or without the state, but that the nonresident shall only be taxed on income derived from sources within the state, or within its jurisdiction, but that any person doing business both within and without the state shall, as respects that part of his income not derived from rentals, stocks, bonds, and securities, be taxed only on that proportion thereof which is derived from business transacted and properly located within the state, to be determined in the manner specified in subd. *e* of sec. 1770*b*, Stats. (Laws of 1907, ch. 562), as far as applicable.

The general purpose of the section is quite evident, namely, to tax a resident upon his whole income, and a nonresident only upon his income plainly derived from sources within the territorial jurisdiction of the state, and to provide that where either person is engaged in a business interstate in its character he shall only be taxed on that portion of the income derived from business transacted and property located within the state, according to the rule prescribed in sec. 1770*b* for determining that proportion of capital stock of a foreign corporation doing business in this state which must be reported to the secretary of state. The rule so imported into the statute is an arbitrary rule, and need not be stated at length in the view we now take of our duty with regard to this contention.

Two fundamental objections are made to this section: *first,* that the state cannot tax the incomes of nonresidents no matter from what source derived, and, *second,* that the attempt to tax a part of the profits derived from an interstate business, under the rule adopted, must necessarily result in a taxation of the receipts of interstate commerce, and hence a regulation

thereof, which is in violation of that clause of the federal constitution which gives to Congress the power to regulate commerce between the states.

We shall decide neither of these questions now. If the section be open to either or both of these objections, or any others, we cannot regard that fact as fatal to the act. The legislature evidently intended to avoid both of the objections made; they had a difficult and delicate subject to deal with. Had they been authoritatively informed that they could not constitutionally tax a nonresident's income at all, and could not divide the income derived partially from state and partially from interstate business, we have no idea that they would on that account have abandoned their purpose to pass the law. Again, if they provided an improper rule for the division (conceding that a division can be made at all), there seems no reason why the rule may not be rejected and the proper rule, which will carry out the fundamental purpose of the provision, be used. In any event we are fully satisfied that the rejection of any or all of the provisions objected to in this section cannot reasonably be held to invalidate the whole act.

When these questions are presented to us in a case actually arising, we shall be able to give them far more critical examination in the light of arguments and briefs directed exclusively to them. For the present, therefore, we leave the various objections to the validity of those parts of this section which are attacked without answer.

For the same reasons we decline at the present time to pass upon the objections to the second section referred to under this head. That section provides generally that a proportion of the interest on corporate bonds (to be ascertained in the same manner as the proportionate taxable income is ascertained in the preceding section) shall be taxed against the bondholders and paid by the corporation, and deducted from the next interest payment on the bonds. Many serious objections on behalf of foreign bondholders are made to this

provision, from the fundamental objection that there is no power to levy such a tax at all, to the minor objection that the rule for ascertaining the proportion is incorrect. As we do not deem it necessary to pass upon any of these objections, we need not make particular statement concerning them now. The subject will be entirely open for discussion when an actual case arises necessitating a decision upon this section.

We have reviewed all of the objections made to the law which we deem of sufficient importance to require specific mention or treatment. As a whole we regard the law constitutional. If there be provisions which will not stand the test, they are not provisions of such a nature that they must be considered as the inducement to or as the compensation for the balance of the law. They may drop out, and leave the law intact in its fundamental and essential features.

As to the *Winding* case, commenced in the circuit court, a few words should be said. This was an action brought by a number of persons and corporations who alleged that they were taxpayers and that they and their fellow taxpayers would be unlawfully taxed and compelled to pay large sums under the alleged unconstitutional law, thus causing a multiplicity of suits; and praying that the officers of the state be enjoined from executing the law and from paying any moneys out of the public treasury in its execution.

This seems to be a taxpayers' action pure and simple, brought in the circuit court to stay the hands of state officers from paying moneys out of the state treasury. We have already held in this opinion that no taxpayer's action can be maintained in the supreme court against the auditing or disbursing officers of the state. If such relief is sought it must be in an action by the state itself, either brought by the attorney general, or, in case of his refusal, by authority of the court itself, upon the relation of a private citizen. It would seem, *a fortiori,* that no taxpayer's action should be entertained in the circuit court where the purpose is to halt the auditing and

disbursing officers of the state. We regard this as the better administration. It is enough that this court has the power to authorize such an action if the exigency demands. To divide up that power and scatter it among the trial courts of the state, and allow every such court to judge of the exigency, might well lead to the bringing of many improvident actions. It is fitting that such an extreme power be vested in this court alone.

The result is that in the *Bolens* action the demurrer to the complaint must be sustained upon the merits, and judgment ordered dismissing the complaint without costs. In the *Winding* case the order sustaining the demurrers must be affirmed, and the action remanded with directions to dismiss the complaint for lack of jurisdiction.

By the Court.—It is so ordered.

TIMLIN, J. (*dissenting in part*). Ch. 658, Laws of 1911, relating to the taxation of incomes and making an appropriation for salaries of officers and other expenses of executing and administering the statute, was enacted by the legislature, approved by the governor, and published July 15, 1911. The act went into effect as law from and after its passage and publication and officers were appointed to administer this law, but no assessment or levy of tax had been made and the time for enforcing the provisions of this act had not arrived when these suits were begun. I shall consider these suits separately, taking up first that begun in the circuit court by *Arthur Winding* and *F. W. Gezelschap* individually and as copartners, the *Wisconsin Trust Company,* a corporation, several other natural persons, a national bank, and the *Milwaukee Coke & Gas Company,* a corporation. These plaintiffs, evidently selected because of diversity of relations to the act in question, affected differently by different sections of the act, but all desirous of escaping payment of the tax, hence interested in the question of the constitutionality of the statute,

join in a taxpayers' suit in their own behalf and in behalf of all the other income taxpayers of the state against three members of the state tax commission, the secretary of state, and the state treasurer. The cause of action alleged is that the act above referred to is null and void because in violation of the constitution of the state of Wisconsin and of the constitution of the United States, and that the members of the state tax commission will, unless restrained by injunction, through their subordinate appointees, acting under said statute, exact and collect large sums of money from many residents and citizens of Wisconsin, which collections will lead to a multiplicity of suits to recover back the moneys so collected or to a multiplicity of suits by the state to collect the fines and penalties provided in and by said act to be enforced against those persons who refuse to comply with the act. On these grounds they pray for an injunction restraining the state tax commissioners and their subordinate administrative officers from attempting to enforce the act and restraining the secretary of state, who is by the state constitution auditor, from auditing, and the state treasurer, who is also a constitutional officer, from paying salaries, bills, or expenses of any kind incurred under or payable by the terms of the act in question. This act carries in it a legislative appropriation for such purpose. This is therefore a bill by taxpayers to enjoin the enforcement of a statute levying taxes upon incomes on the ground that the statute is unconstitutional, which bill is sought to be upheld upon the equitable ground that it takes the place of a multiplicity of suits or actions, but so far as the secretary of state and the state treasurer are concerned it is a bill to restrain the payment of moneys out of the state treasury for the purpose of administering or enforcing a law claimed to be invalid. As to the latter defendants, who have no part in executing or enforcing the act except auditing and paying bills, salaries, and expenses under the legislative appropriation, the bill is maintainable only upon

the ground that each individual taxpayer in the state has a proprietary interest cognizable in equity in the funds of the state treasury in analogy to the shareholder in a private corporation or the taxpayer in a municipal corporation. *Land, L. & L. Co. v. McIntyre,* 100 Wis. 245, 256, 75 N. W. 964, and cases.

The circuit court sustained a demurrer to this complaint, and from that order the plaintiffs appealed to this court. This demurrer went expressly to the point that the circuit court had no jurisdiction of the action, and also to the point that the complaint did not state facts sufficient to constitute a cause of action; so that both these questions are before us on this appeal. Generally speaking the law does not give a private remedy for the redress of a public wrong. One damaged or threatened by an unlawful act which affected him only as it affected that section of the public holding the same legal relation to such act, could not at common law or in equity maintain an action against the doer of such act. And it mattered not that his damages were greater. If they were of the same nature and differed only in degree the wrong was still a public wrong. The rule has been applied in a great variety of cases in this court. *Enos v. Hamilton,* 27 Wis. 256; *Cohn v. Wausau B. Co.* 47 Wis. 314, 2 N. W. 546; *Baier v. Schermerhorn,* 96 Wis. 372, 71 N. W. 600; *Stedman v. Berlin,* 97 Wis. 505, 73 N. W. 57; *Liermann v. Milwaukee,* 132 Wis. 628, 113 N. W. 65; *Linden L. Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 83 N. W. 851; *Pedrick v. Ripon,* 73 Wis. 622, 41 N. W. 705; *Bell v. Platteville,* 71 Wis. 139, 36 N. W. 831; *Stone v. Oconomowoc,* 71 Wis. 155, 36 N. W. 829; *Gilkey v. Merrill,* 67 Wis. 459, 30 N. W. 733, and cases cited; *Sage v. Fifield,* 68 Wis. 546, 32 N. W. 629; *Harley v. Lindemann,* 129 Wis. 514, 109 N. W. 570; *Foster v. Rowe,* 132 Wis. 268, 111 N. W. 688; *Carstens v. Fond du Lac,* 137 Wis. 465, 119 N. W. 117; *Nast v. Eden,* 89 Wis. 610, 62 N. W. 409.

It has been sometimes said by law writers and courts that this rule rested upon the consideration that, if one suit could be maintained in such case, each person affected might also bring suit and thus the defendant be ruined by litigation. This consideration has special significance and force in a state where the law permits suits to be brought by private persons against administrative officers charged with the duty of enforcing the law. Few officers would attempt an efficient administration at such risk, and the ultimate result must be either injustice or inefficiency. But there is another reason for the rule which lies deeper and upon a broader foundation of governmental policy. That is the policy which places the prosecution of public wrongs in the hands of the public prosecutors and out of the hands of those who may be actuated by private revenge or gain, malice, or political intrigue. *Biemel v. State,* 71 Wis. 444, 37 N. W. 244. If the state as a sovereign is to have its proper and lawful recognition in our jurisprudence, it is, in the absence of statute, subject to no defense of laches, no limitation of time, and no liability to suit, and it must also be regarded as the repository of governmental policy and political discretion. When and how it will assert and enforce its sovereign prerogatives is often a political question, a matter of state policy, and to leave these great questions in the hands of every private litigant has a tendency to create confusion in jurisprudence, lack of wisdom in state policy, and contempt for authority. In the great case of *Att'y Gen. v. Railroad Cos.* 35 Wis. 425, Chief Justice RYAN said at page 529: "Relief against public wrong is confined to informations by the attorney general." See further, for illustration, *Saylor v. Pennsylvania C. Co.* 183 Pa. St. 167, 38 Atl. 598. The victim of robbery, battery, or arson may have a private action for damages against the wrongdoer, suspended, according to some, until the pending public or state prosecution is at an end, and not concluded by the result of the

public prosecution. But there there is coincident and cotemporaneous with the public wrong a private wrong suffered by the victim, distinct and different from that suffered by any other member of the public. Where all are affected alike by the wrongful act, the language of the cases and many of the actual adjudications indicate that there is no private actionable wrong, not merely a lack of remedy. Cases *infra* and *supra*. An exception to these general rules was recognized in the case of taxpayers, first in this state, I think, in *Peck v. School Dist.* 21 Wis. 516, and this doctrine received the approval of the supreme court of the United States in *Crampton v. Zabriskie,* 101 U. S. 601. Since then the scope of the taxpayer's action, so called, has been greatly extended by this court and its decisions have not always been consistent. In *Peck v. School Dist., supra,* the action was brought by certain taxpayers whose personal property had been levied upon and advertised for sale to restrain local administrative officers from action taken contrary to statute and consequently outside of their jurisdiction, to the private injury of plaintiffs. Their remedy for this conceded private wrong would ordinarily be at law. But the contract which formed the basis for the tax was found to be fraudulent, thus arousing the jurisdiction of equity, and the injunction against the enforcement of the tax sustained upon the ground that, the jurisdiction of equity having once rightfully attached, it should be made effectual for the purposes of complete relief. The decision of the court was written by Chief Justice DIXON. When the question was presented about four years later in a suit by taxpayers involving no recognized ground of equity jurisdiction, but showing the plaintiffs to be taxpayers threatened with the enforcement of an illegal tax precisely as it is presented by the complaint in the instant case, except that there it was averred the local administrative officers acted without their statutory jurisdiction, while here it is averred that the legis-

lature of the state acted without its constitutional jurisdiction, the same distinguished jurist, denying the injunction, said among other things:

"The general principle that equity possesses no power to revise, control, or direct the action of public, political, or executive officers or bodies is of course well understood. It never does so at the suit of a private person, except as incidental and subsidiary to the protection of some private right or the prevention of some private wrong, and then only when the case falls within some acknowledged and well defined head of equity jurisprudence. It is upon this principle that bills to restrain the collection of a tax have in general been dismissed" (citing cases). "But there are other reasons why equity will refuse its aid in a case like this, and which are most ably pointed out in the opinions in *Doolittle v. Supervisors,* 18 N. Y. 155, and in *Sparhawk v. Union P. R. Co.* 54 Pa. St. 401. The grounds are too remote, intangible, and uncertain, and the public inconvenience which would ensue from the exercise of the jurisdiction would be enormous. It would lie in the power of every taxpayer to arrest all proceedings on the part of the public officers and political bodies in the discharge of their official duties, and, assuming to be the champion of the community, to challenge them in its behalf to meet him in the courts of justice to defend and establish the correctness of their *proposed official acts* before proceeding to the performance of them. A pretense more inconsistent with the due execution of public trusts and the performance of official duties could hardly be imagined." *Judd v. Fox Lake,* 28 Wis. 583.

This case has been cited and followed many times. In *Gilkey v. Merrill,* 67 Wis. 459, 30 N. W. 733, wherein it was expressly adjudicated that an action will not lie in behalf of a taxpayer to set aside the taxes of a city or other municipality generally, *Judd v. Fox Lake* is cited to support the rule that there must be some distinct principle of equity jurisprudence under which the case is brought other than the mere illegality of the general taxes and its necessary and usual consequences. In *Pedrick v. Ripon,* 73 Wis. 622, 41 N. W.

705, to the effect that the mere passage of a resolution and intent to enforce it are not sufficient to support a taxpayer's suit. In *Sage v. Fifield,* 68 Wis. 546, 32 N. W. 629, to the same effect. In *Foster v. Rowe,* 132 Wis. 268, 111 N. W. 688, to the effect that no action will lie by a taxpayer in his own behalf and in behalf of other taxpayers to restrain the levy and collection of the taxes of a municipality generally. See, also, *Harley v. Lindemann,* 129 Wis. 514, 109 N. W. 570. If the equitable ground of the prevention of a multiplicity of suits could be invoked to support such a taxpayer's action for the reason that the collection of an invalid tax will breed a multitude of suits at law to recover back the taxes or on the ground that it will require a multitude of suits or proceedings in the nature of suits by the state to collect the taxes, then manifestly the foregoing cases were incorrectly decided, for all invalid tax levies give rise to suits to recover back the taxes, and generally the nonpayment of taxes is followed by penalties of some kind. Such suits are also forbidden by the rule which prohibits the courts to entertain suits by a private citizen to vindicate a public right, or that which prohibits a court of equity from employing its preventive remedies so as to interfere in a wholesale way with the collection of the public revenues. But I think they were correctly decided upon either ground. See *Bell v. Platteville,* 71 Wis. 139, 36 N. W. 831, and reasons there given for refusing to entertain the taxpayer's suit; *Stone v. Oconomowoc,* 71 Wis. 155, 36 N. W. 829; *Harley v. Lindemann,* 129 Wis. 514, 109 N. W. 570; *Carstens v. Fond du Lac,* 137 Wis. 465, 119 N. W. 117. In the latter case the right of a taxpayer to sue in behalf of other taxpayers is denied where the plaintiff merely seeks to relieve his property of a tax which he claims to be void. In *Giblin v. North Wis. L. Co.* 131 Wis. 261, 111 N. W. 499, the cases are cited which hold that a decree in a taxpayer's suit is binding upon all the taxpayers and citizens of the municipality concerned in the litigation. The taxpayer's suit

as both created and limited by judicial decisions in this state has been productive of very beneficial results in preventing municipal maladministration, conserving municipal funds and property, and keeping fraudulent or erring municipal officers within their jurisdiction. But the fact that it has cured some ills does not prove it a panacea. It has its limitations, as above shown, founded upon sound policy, even with respect to subordinate municipal officers. For stronger reasons those limitations must be applied when the suit is state-wide in its operation and is in effect a suit against the state to prevent the entire state levy and collection of a tax on the averment that the law sought to be enforced is unconstitutional. The state as such has immunity from actions except where expressly authorized by statute, and here no such statute exists covering the instant case. The state officers in the execution of a law have a wider latitude of discretion than municipal officers. Taxpayers' suits against the latter are brought to vindicate some law, here to annul a statute. The taxpayer here attempts to represent a larger constituency, and the arrest by injunction of all the taxes of the state surely implies a wider scope of power, larger interference with administrative officers, and multiplication of the serious consequences mentioned in the quotation from *Judd v. Fox Lake, supra.* It seems apparent that under the decisions of this court the first action cannot be supported as a taxpayer's action based upon the avoidance of a multiplicity of actions at law or suits in equity. The other ground averred in support of the complaint is, as said, based upon the claim that each taxpayer of the state has an equitable proprietary interest in the funds in the state treasury, or an interest of such a nature that equity will recognize it and protect it by injunction against the constitutional fiscal officers of the state to prevent them from paying out of such treasury funds for the execution or administration of an unconstitutional law, under the rule applied to municipalities in *Land, L. & L. Co. v. Mc-*

Intyre, 100 Wis. 245, 256, 75 N. W. 964; *Estate of Cole* (*Mulberger v. Beurhaus*), 102 Wis. 1, 78 N. W. 402; and other cases in this court. But the situations are not analogous. The state is not to be put upon the level of a private or of a municipal corporation. The former is the sovereign, the latter the subjects. The courts have jurisdiction in an action against a municipality as against a natural person. They have no jurisdiction of actions against the state except with the consent of the state expressed by the legislative branch of the government and approved by the executive. Unlike the federal constitution and the constitutions of most of the states, the constitution of this state creates and recognizes not three but four branches of government: legislative, executive, administrative, and judicial. Administration is logically and in most cases legally recognized as an exercise of the executive power. The heads of the great administrative departments of the United States government derive their power from the grant of executive power in the federal constitution and their lawful acts are treated as acts of the chief executive, and in some instances an injunction against them to prevent the enforcement of law challenged as unconstitutional was put upon the same level as a like injunction against the President. *Mississippi v. Johnson,* 4 Wall. 475; *Georgia v. Stanton,* 6 Wall. 50, and cases in Rose's Notes. The administrative officers named in art. VI of our state constitution are secretary of state, treasurer, and attorney general for the state, and sheriffs, coroners, registers of deeds, and district attorneys for the counties. Among the duties of the secretary of state prescribed by the constitution is that "he shall be *ex officio* state auditor." There is no general grant of the whole administrative power to any one of or to all these officers, and doubtless this and sec. 4 of art. V, which requires of the governor that "He shall expedite all such measures as may be resolved upon by the legislature, and shall take care that the laws be faithfully executed," is sufficient authority

for the legislature to impose upon the governor and upon subordinate administrative officers like the state tax commissioners all necessary administrative powers not by the constitution vested in the administrative officers therein mentioned. There is also found in our state constitution some express limitations upon the power of the legislature over the funds in the state treasury and some restrictions of that power by necessary implication. Instance sec. 18 of art. I, which provides that no money shall be drawn from the treasury for the benefit of religious societies or religious or theological seminaries. Also sec. 2, art. VIII, which forbids an appropriation for the payment of any claim (except claims of the United States and judgments) not filed within six years after the claim accrued; and there are others. *State ex rel. New Richmond v. Davidson,* 114 Wis. 563, opinion of DODGE, J., at page 580, 88 N. W. 596, 90 N. W. 1067. There are restrictions by necessary implication, as sec. 1, art. X, which provides that the compensation of the superintendent of public instruction shall not exceed the sum of $1,200 annually. *State ex rel. Raymèr v. Cunningham,* 82 Wis. 39, 50, 51 N. W. 1133. But these only accentuate the application to all other treasury disbursements of the rule fundamental in popular representative governments that the popular branch of the state legislature or the legislative branch of the government shall control the public purse. *Expressio unius est exclusio alterius.* In no system is the judiciary the guardian of the public treasury except as the constitution by restrictions upon legislative power in this direction may have so provided that a judicial controversy not involving political discretion may arise. The manner in which appropriations of money must be made is regulated, and there is a general provision, recognizing the authority of the legislative branch of the government over the public funds, to the effect that no money shall be paid out of the treasury except in pursuance of an appropriation made by law. There is in the instant case an

appropriation made by law, but it is contended that this appropriation, being made for the purpose of administering or carrying into effect an unconstitutional law, is itself unconstitutional. What provision of the constitution does it conflict with if we suppose the premises correct? The state legislature is not expected to find a grant of power to it in the state constitution. Where there is no restriction it possesses the power. *Comm. v. Plaisted,* 148 Mass. 375, 19 N. E. 224. There is no such restriction upon the power of the legislature over the public funds. On the contrary it may well be within the duty, at least it is within the discretion, of the legislature that all laws, even invalid laws, be enforced and thus brought to the test before the courts in the ancient, well understood, and lawful way. But in any event the courts have no authority to interfere by injunction and thus forestall attempts to enforce the law. This because the taxpayer has no interest in the funds in the public treasury to restrain these officers, and because the court has no power to create such an interest in the taxpayer, and because the court does not possess the power, where no constitutional interdict intervenes, to control the disbursements of public funds as against the legislative branch of the government. But of this hereafter.

It further seems to me obvious that a suit by a taxpayer against such fiscal officers of the state, based upon the claim that a statute is unconstitutional, is a suit by a private person against the state, not going upon any apprehended destruction or confiscation of his property or clouding his title, as we say in legal phrase, not *quia timet* but ostensibly as champion of the public interests and in self-assumed protection of public funds, and really to avoid payment of the tax by arresting the power of the state in its attempt to execute the law by furnishing the funds for that purpose. That this is a suit against the state is settled by authority here and elsewhere. It falls within the rule of *State ex rel. Drake v. Doyle,* 40 Wis. 175, sixth paragraph of opinion, and the cases

there selected for approval. *Stephens v. T. & P. R. Co.* 100 Tex. 177, 97 S. W. 309; *Lord & P. C. Co. v. Board of Agriculture,* 111 N. C. 135, 15 S. E. 1032; *State ex rel. Hart v. Burke,* 33 La. Ann. 498; *Poindexter v. Greenhow,* 114 U. S. 270, 5 Sup. Ct. 903, and cases in Rose's Notes; and *Fitts v. McGhee,* 172 U. S. 516, 19 Sup. Ct. 269, are in point, and other cases can be found. Quoting from the last cited case:

"If, because they were law officers of the state, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the governor and the attorney general, based upon the theory that the former as executive of the state was, in a general sense, charged with the execution of all its laws, and the latter, as attorney general, might represent the state in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons." See, also, *Ex parte Young,* 209 U. S. 123, 157 *et seq.,* 28 Sup. Ct. 441.

But there emerges here what is perhaps a larger question. To say that the courts have jurisdiction to review statutes at the suit of any taxpayer of the state who seeks to enjoin the payment of moneys out of the state treasury for the administration or enforcement of those statutes is to establish a general revisory jurisdiction in the courts over all legislation before any actual judicial or justiciable controversy has otherwise arisen. I may safely say that no statute is received with unanimous approval. A taxpayer may always be found. It is no answer to say that the court has a discretion as to when it will recognize this right of the taxpayer or issue its injunction. That only changes the principle which it is sought to engraft upon our form of government to the extent that we

are to modify the statement of it by saying: "The courts have the power in their discretion to review all legislation," etc. To my mind it is an obvious fallacy to say that this power or this discretion extends only to the review of unconstitutional statutes. As well might one say that courts had jurisdiction to try only guilty persons charged with crime. The inquiry proposed is whether or not the act in question is unconstitutional, and it is to entertain such inquiry and decide it for or against the validity of the statute that the jurisdiction exists if it exists at all. To recognize a power resident in the courts by which that branch of the government could supervise legislation in this way would be to create a radical change in our plan of government as heretofore understood. This must be quite apparent to those who have extended their legal studies beyond the *minutiæ* of adjudged cases and the rules of private right and have acquired some knowledge of the principles of government. All revenue measures and most other statutes involve some charge upon the public treasury for their administration. All acts of the legislature involve the expenditure from the state treasury of at least printing and publishing. Therefore all statutes would at this preliminary stage be subject to judicial review. In reply to a suggestion of this kind from the bench one of the learned counsel for plaintiffs suggested that this expense was so small that a suit would not be entertained because *de minimis non curat lex.* But this answer overlooked the cases of *Mueller v. Eau Claire Co.* 108 Wis. 304, 84 N. W. 430, and *Chippewa B. Co. v. Durand,* 122 Wis. 85, 108, 99 N. W. 603, wherein it was held that the court will not inquire into the amount or extent of the taxpayer's interest so long as he is a taxpayer. Besides, it overlooked the consideration that in a republic founded upon the equality of its citizens before the law it would be quite inconsistent with fundamentals to rest the jurisdiction to review legislative acts at this preliminary stage of their existence upon the wealth of the taxpayer who comes in to represent

himself and the public. Nor can the amount of the charge which the law imposes on the state treasury affect this question, which is one of jurisdiction. No statute gives the taxpayer an interest in the funds in the state treasury. The courts must invent that species of property right if it is to have recognition in the courts. The courts also have considerable discretion in granting or withholding injunctions. This inevitably leads to the conclusion that the court is asked to create or recognize a right not given by common law or statute and then exercise its discretion to issue an injunction to prevent threatened invasion of this right, and all for the purpose of making an occasion or an opportunity to review the constitutionality of a statute at the preliminary stage of its existence, before its enforcement is attempted and before any controversy otherwise justiciable has arisen. To do so would conflict with the notion of constitutional law and the powers of the judicial branch of the government with reference to declaring laws unconstitutional announced in *Marbury v. Madison,* 1 Cranch, 137, and many cases since. It has been said that courts never declare a statute unconstitutional, but, being confronted with a judicial question which it may not evade and with a constitution which commands one thing and a statute which commands the opposite, they reluctantly and unavoidably obey the paramount, not the subordinate, command. The result of the grave duty thus forced upon the court is unconstitutionality of the statute because it is incapable of enforcement in the courts which speak last. But here we are asked not only to compare the statute with the constitution, but to make the occasion for so doing, and to hold for the purpose of enabling us to do so, by legislation, legal fiction, or unprecedented judicial decision, that every taxpayer has a proprietary interest in the funds in the state treasury. The controversy at this stage concerning the constitutionality of a statute is the same which was or might have been presented to the judiciary committees of the legislature or to the legis-

lature in session the same as that waged before the governor to induce him to veto the act. It is in the nature of an appeal from the legislative and executive branches of the government to the judicial.

"The theory upon which, apparently, this suit was brought is that parties have an appeal from the legislature to the courts; and that the latter are given an immediate and general supervision of the constitutionality of the acts of the former. Such is not true. Whenever, in pursuance of an honest and actual antagonistic assertion of rights by any one individual against another, there is presented a question involving the validity of any act of any legislature, state or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must, in the exercise of its solemn duties, determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act." *Chicago & G. T. R. Co. v. Wellman,* 143 U. S. 339, 12 Sup. Ct. 400.

See, also, *Charles River Bridge v. Warren Bridge,* 11 Pet. 420; *Georgia v. Stanton,* 6 Wall. 50; *Mississippi v. Johnson,* 4 Wall. 475. An injunction will not issue to restrain the execution of an unconstitutional law merely on the ground that it is unconstitutional. *Thompson v. Comm'rs,* 2 Abb. Pr. 248; *Birmingham v. Cheetham,* 19 Wash. 657, 54 Pac. 37; *People ex rel. Alexander v. District Court,* 29 Colo. 182, 68 Pac. 242. I am convinced that the decision below was correct and should be affirmed.

In the second suit a private citizen who is also a taxpayer seeks as relator to begin in this court an action by and in the name of the state against the secretary of state and state treasurer for the purpose of enjoining them from paying out funds from the state treasury for salaries and other expenses of ad-

ministering this law, and also against the members of the state tax commission, enjoining the latter from exercising the duties and powers conferred upon them by the act in question, all upon the ground that this act is unconstitutional. As against the secretary of state and state treasurer the ostensible purpose of the bill is to protect the state treasury; as against the state tax commission the real purpose of relator to avoid paying income tax is disclosed. No steps have been taken to enforce the law and the time for its enforcement has not arrived. Application was by relator made to the attorney general to begin and prosecute this suit, that official refused, and the relator on this showing, with the usual averments of irreparable injury, etc., seeks to arouse the original jurisdiction of this court to entertain the suit, to put his private counsel in the place of the attorney general to prosecute it, and to have the state at this stage of existence of the statute enjoin its own officers from collecting its own revenue upon the averments that the statute is unconstitutional. The constitutional grant of power to this court is that

"The judicial power of this state, both as to matters of law and equity, shall be vested in a supreme court, circuit courts, courts of probate, and in justices of the peace. . . ." Art. VII, sec. 2.

"The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state. . . . The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of *habeas corpus, mandamus,* injunction, *quo warranto, certiorari,* and other original and remedial writs, and to hear and determine the same." Art. VII, sec. 3.

That portion of the last above quoted section giving power to issue the writs mentioned and to hear and determine the same was construed to confer upon this court original jurisdiction of all judicial controversies within the scope of and instituted by the issuance of such writs at common law, but

it was said that the court would only exercise the power thus granted in controversies affecting the sovereignty of the state, its franchises and prerogatives, or the liberties of its people. It was also decided that the writ of injunction, found in this section associated with the so called prerogative writs, might also for this reason be employed to assert the prerogatives of sovereignty. Cases collected in *State ex rel. Lamb v. Cunningham,* 83 Wis. 90, 53 N. W. 35. Rules regulating the exercise of the original jurisdiction as distinguished from the appellate jurisdiction of this court, while appropriate and desirable to facilitate our work, are not fundamental. Power is derived from the constitution, not from such rules, which only operate to regulate the manner of its exercise. They merely serve to indicate when the parties litigant should approach this court in the first instance and when reach this court by appeal or writ of error. There is, I think, a marked inconsistency between such cases as *State ex rel. Drake v. Doyle,* 40 Wis. 175; *In re Hartung,* 98 Wis. 140, 73 N. W. 988; and *State ex rel. Stengl v. Cary,* 132 Wis. 501, 112 N. W. 428; and other cases found in our reports and referred to in the opinion written by Chief Justice WINSLOW herein. I am quite satisfied with the opinion of the court in this respect, but fear it will meet the usual fate of mere judicial warnings and be again disregarded when a new exigency arises. The constitution vests in this court only judicial power, thus excluding by implication political, administrative, and legislative power. The power to institute a suit by and in the name of the state cannot logically be said to be an exercise of judicial power. It is rather executive or administrative. The attorney general, district attorneys, the governor, and other officers possess this power although they exercise no judicial power. It is only by historical associations of the words "judicial power," as distinguished from scientific definition, that the act of instituting a suit in court in the name of the state can be called an exercise of judicial

power. Assuming it to be settled by precedent that the judicial power mentioned in our constitution is that power formerly exercised by the court of King's Bench and the Chancery courts in England, still that power fell short of authorizing an attack by suit upon the acts of co-ordinate departments of government by any writ before any legal controversy had arisen by the attempted execution of such acts. How then did this court acquire jurisdiction to authorize the institution of and then to entertain such a suit? Neither logical analysis of the term "judicial power" nor historical association warrants the exercise. The restriction of suits against the state is quite impotent if every taxpayer of the state, while he cannot make the state a defendant in his suit, may nevertheless make the state a plaintiff in a civil action against the same state officers to fight his battle for him. If these state officers represent the state in an action against them to restrain them from enforcing the law, they occupy the same legal position and make the same claims when this form of making the state plaintiff is complete. We can hardly say that the controversy has become a suit by the state against the state, for that would be absurd. We cannot liken the state to a trustee seeking the advice and direction of the court, for that presupposes a supervisory jurisdiction over the trust and in the court and begs the question. We cannot find an analogy in the governments of those states like Massachusetts where the governor or the legislature may call upon the court for an opinion in advance of enactment and of litigation, because there it is conceded that the courts in giving such opinions act not in a judicial but in a political capacity. *Opinion of Justices,* 126 Mass. 557, 566. Turn this as we will, we are always confronted with the fact that, whether the taxpayer is plaintiff or the state plaintiff, the suit involves a claim on the part of this court of power to revise and review acts of the legislature with reference to their constitutionality before any judicial controversy has arisen other than a con-

troversy nursed into life and existence by this court for the purpose of such revision. All that I have said and quoted with reference to the action in the name of the taxpayer on this point applies to this action. Of the two I would prefer the taxpayer's suit, because this is subject to the same weakness and also savors of subterfuge. Sovereignty is one and indivisible. But in the exercise of sovereign power all the great departments of government must concur. The manner of this concurrence is regulated by the division of governmental powers in the constitution and the limitations placed upon each department arising from this division or from express or necessarily implied restrictions found in the organic law. This sometimes impairs efficiency, but it promotes liberty. The most promptly efficient government is a despotism. It is the wisdom of the spendthrift which sacrifices future advantage for immediate gratification. The statesmen who founded the American republic understood these things and made deliberate choice between a government of liberty and one of temporary and prompt efficiency. The result thus far has justified their judgment. In the prevailing plan of government the guardianship of the funds in the public treasury, except when otherwise specially provided, is committed to the legislative branch of the government, which is responsible to the people. The judicial branch of the government is to take no part in political questions. In consummation of the exercise of the sovereign power it is to act last, and to act only when aroused by an actual judicial controversy. Until it comes before the court incidentally in such controversy, the question of the constitutionality of a statute is a political, not a judicial question. There is therefore no jurisdiction resident in the courts, as there is in the legislature and the governor, to declare an act unconstitutional in advance of a judicial controversy which necessarily involves that question. The court therefore has no jurisdiction to create such controversy by authorizing what is to my mind a fictitious suit in behalf

of the state against its own officers, where the ground for such a suit is that these officers are about to collect taxes under a general tax law. That is merely a statement of the rule that what cannot constitutionally be directly done cannot be done by indirection. The latter breaks down the American republican form of government as well as the former. Examining from another viewpoint: In a case where a bounty was granted to manufacturers of sugar by Congress and the disbursing officer of the treasury refused payment under the belief that the act of Congress was unconstitutional, and the statute authorized a suit against the United States, an actual justiciable controversy thus arose. But even here, and under a constitution carrying delegated power only, the supreme court of the United States decided, as set forth in the second paragraph of the syllabus:

"It is within the constitutional power of Congress to determine whether claims upon the public treasury are founded upon moral and honorable obligations, and upon principles of right and justice; and having decided such questions in the affirmative, and having appropriated public money for the payment of such claims, its decision can rarely, if ever, be the subject of review by the judicial branch of the government." *U. S. v. Realty Co.* 163 U. S. 427, 16 Sup. Ct. 1120. Approved in *Allen v. Smith,* 173 U. S. 589, 19 Sup. Ct. 446, and cited in *State ex rel. Garrett v. Froehlich,* 118 Wis. 129, 143, 94 N. W. 50.

If we compare the instant case with the above we will find that here no justiciable controversy has arisen, but the court is asked to make one by authorizing a suit in the name of the state upon the petition of a taxpayer, and that here we are asked to decide in such suit that the legislature, which possesses all power not forbidden, had no power or discretion to make an appropriation of public moneys for the purpose of enforcing a statute passed by its legislature and approved by its executive. I think this court has no jurisdiction so to do. For the court to decide before its judicial power is aroused

by a legal controversy is to assume a jurisdiction not given to it by law. I think the assumption of such jurisdiction changes the form of government as heretofore established and understood, and therefore we are justified in disregarding or overruling precedents in this court which might by mere logical inference seem to support this suit. I think we should have the courage to stop before taking this last step fraught with such consequences. In this connection I wish to mention the case of *State ex rel. Rosenhein v. Frear,* 138 Wis. 173, 119 N. W. 894, which was a motion for leave to bring suit in the name of the state. When that motion was presented it will be remembered by those present that I protested vigorously from the bench against countenancing any such proceeding. I thought then and I still think that the suit there suggested was preposterous. If the legislature of Wisconsin had not been a body of rather feeble temper it might not be entirely discreet for judicial officers to assert the right to launch and determine such a suit. But the motion was denied, and I regret to say that I gave no careful attention to the language of the opinion denying the motion and neglected to dissent therefrom. I do not think either that the complaint states a cause of action in favor of the state and against its officers. The mere fact that taxes will be collected from a large number of its citizens by the state authorities for the state creates no actionable wrong against the state. All general laws affect all the people of the state and all police regulations curtail their rights or liberties to some extent. But this gives no right of action to the state. Neither can a general tax law, be it ever so new. The notion that the state has a right of action to test such laws is, to say the least, very novel. Nor does the fact that a law which appears on its statute books and is about to be enforced at some expense upon the state treasury do so. It is the legal and constitutional way in which to handle a law whether that law be valid or invalid. It is the proper mode of getting that law before

the courts. It merely amounts to saying that the officers of the state are about to enforce the state statutes in such manner as to create justiciable controversies which will thus come before the court in the ancient, established, and orderly way. Surely such attempt is not actionable. If the statute is valid it is their duty to enforce it, and it is in any event their duty to obey it until it is held to be invalid by the judicial branch of the government in a judicial controversy of which the latter branch has jurisdiction. If the legislature has discretion to recognize merely moral obligations and appropriate money for their payment, it surely may appropriate money for enforcing even a void act and thus bringing it to the judicial test in an actual controversy. It may be that in the march of progress and the evolution of governments the change in the plan of our government created or confirmed by the decision herein is inevitable. But I mistrust, and I think not through timidity, the steady progress of this court always in the direction of grasping more power. This will establish the judiciary as a political branch of the government and displace it from that place of dignified impartiality which it has so long and so successfully filled. This extension of power is the progress which has always resulted in the wreck of human institutions. I have now made my protest against it in *In re Appointment of Revisor,* 141 Wis. 592, 124 N. W. 670; in *State ex rel. Kustermann v. Board of State Canvassers,* 145 Wis. 294, 130 N. W. 489; in *State ex rel. Rosenhein v. Frear, supra;* in *Lawler v. Brennan,* —— Wis. ——, 134 N. W. 154, and in the instant case, and so discharged what I conceive to be my duty. In any view of the case, even that taken in the majority opinion, it seems to me the second action should be dismissed for want of jurisdiction as against the secretary of state and the state treasurer. But I consider that this court has, under the constitution of this state, no jurisdiction to review the statute at this stage of its existence and in this way in either case. The assumption of the jurisdiction so to do

cannot be justified upon the comparative futility of such review demonstrated by the result in this case.

MARSHALL, J. I concur in the decision and in the stated general character of this court's original jurisdiction, viz.: that it is wholly of a prerogative character, to be exercised in the name of the sovereign,—the state, standing for the people as an entirety.

I concur that prerogative judicial jurisdiction under the constitution is reserved, wholly, to this court, and that an ordinary taxpayer's action to vindicate private rights is entirely outside of that field.

I do not concur in the view that the circuit courts have no jurisdiction of taxpayer's actions to enjoin illegal disbursements or waste of state money under the guise of an unconstitutional legislative enactment. The jurisdiction of such circuit courts is as boundless under the constitution, as to all ordinary matters, as can be the violations of legal or equitable rights. It was lodged there by the people in the beginning. It cannot be given, taken away, or modified, legitimately, by any fiat of this court or in any way except in the manner pointed out in the fundamental law without invading the field of usurpation.

The historical treatment of this court's administration of its original jurisdiction is not to be taken, I apprehend, as intended to indicate that its power is fenced about by mere precedents, or at all, except by the broad prerogative purposes of the grant. So far as the classification of precedents illustrates the general nature of the jurisdiction respecting what is and what is not within the field of prerogative purpose, it is very valuable but should be regarded, I think, in that light only. Any situation calling for remedial activity which falls within the prerogative field falls within the original jurisdiction of this court, regardless of whether there is any precedent to fit the case; but whether such jurisdiction should be exer-

cised or not in any given case must, necessarily, rest, more or less, in judicial discretion.

I do not concur in the restrictive character of the decision. I think the court should meet now and decide now, plainly and permanently, each of the important questions discussed by counsel, which, obviously, must be decided by this court sooner or later, and the earlier the better for all concerned. Any delay I think should be avoided, if possible, thus obviating the occurrence of a period of uncertainty characterized by expensive litigation and business disturbance attributable to failure by this court to grapple now, after the full argument had, efficiently with the matters referred to. Judicial progress along that line is the correct judicial policy. It is wholly within the court's power to so progress. It is the need of the times. The whole people of the state, as it were, are before this court in this case invoking it to make a full decision. It is due to them to respond as effectually as practicable.

At some future time I will substitute for this brief memorandum an opinion in support of the suggestions made.

The following opinion was filed March 15, 1912:

MARSHALL, J. I fully determined to write, at length, in substitution for the above. On further reflection it seems to do so might give unwarranted dignity to some suggestions voiced in these cases which were, as is supposed, effectually foreclosed more than a century ago, and so are not, generally, and should not, efficiently, be deemed open for discussion.

After the uniform holdings here, through many important adjudications, that public money in the public treasury, is a subject of trust for all the people for public purposes and disbursable, only, pursuant to valid legislation, and that every taxpayer is a *cestui que trust* having sufficient interest in preventing abuse of the trust to be recognized in the field of this court's prerogative jurisdiction as a relator in proceedings to set sovereign authority in motion by action in the name of

the state for prevention or redress, any suggestions to the contrary, however well supported as an original proposition, might well have but a passing notice. The same is true of the question of whether an action against a state officer to prevent disbursement of public money in the enforcement of an invalid act of the legislature is against the state in any proper sense. It has been held over and over again, in terms or in effect, that such an action is to be regarded as against the person in his individual, not his official capacity, and so not against the state,—so held very recently most significantly by the supreme court of the United States. *Ex parte Young,* 209 U. S. 123, 28 Sup. Ct. 441, followed here in *Bonnett v. Vallier,* 136 Wis. 193, 116 N. W. 885.

It is essential to strictly maintain here the foregoing stated principles. Only by so doing can this court fully perform its great function as the supreme efficient conservator, defender, and preserver of the inherent and guaranteed rights of the people. The court will not swerve from the proper course for which it was given independent status, "through fear, favor, affection, or hope of reward." I know every member of it is firm in that. No unreasonable impatience elsewhere, if such exists, will be permitted to interfere with the sturdy performance of constitutional duty here. While paying due deference to co-ordinate departments it must expect that deference in return. There must be no hesitation through fear of censure or thought of tuning the judicial harpstrings to harmonize with temporary conditions, as we hear advocated outside at times. In that there is no division of sentiment here.

I have too much respect for the lawmaking power to indulge the idea that there is any dominating thought there hostile to the willing performance of duty here to test enactments by constitutional restraints on all proper occasions, and put the stamp of judicial disapproval thereon when manifestly required because of the enactment being evidently not law in fact though law in form; and too much respect for

the average legislative sentiment not to see through the vista of momentary impatience,—sometimes exhibited, at the failure of legislative effort,—to the considerate judgment of after reflection which may always be depended upon to approve and honor full performance of judicial duty to appreciate that when there is a conflict between an act and the constitution, as seems to the court created to view the matter, it must decide between them and "as the constitution is superior to any ordinary act of the legislature the constitution and not the ordinary act must govern the case to which they both apply." *Marbury v. Madison,* 1 Cranch, 137. On the other hand, I have too high regard for the great trust reposed in the instrumentalities chosen for now to give vitality to the judicial function, to think that, if there be any considerable sentiment, momentarily, elsewhere inimical to full performance of duty here, it can exert efficient influence in that regard. Generally speaking, I apprehend the sentiment of the public is in favor of a prompt, thorough treatment of constitutional questions as they arise. The people want to know, and have a right to know and legislative instrumentalities desire to have them know, at the earliest practicable moment, just where they stand with reference to important new, far-reaching enactments.

The fundamental law, as it has been construed, and the function of this court as to applying the rule of the constitution to legislative enactments and using its prerogative power against any one assuming to act for the state who would otherwise interfere with guaranteed rights under the guise of an invalid enactment, must be maintained. No one can win enduring fame by failing to appreciate that and be ready to vigorously vindicate it.

The court, with practical unanimity, reached the conclusion that all constitutional questions presented and argued in the cases, in some one of them, were within the court's power to

consider and decide; but to what extent to respond was within its discretion. That left much to judicial propriety, convenience, exigency, and expediency, resulting in the court going only so far as was vital to the existence of the commission with power to enforce the dominating features of the law. Not to go that far was thought would be well nigh, if not quite, abuse of discretion; not doubting competency to go further and decide all important questions so ably discussed. Obviously, there is left a broad field for very much and very perplexing litigation, to the probable great prejudice of public and private welfare. The field so left untouched was as fully covered by eminent counsel as it is liable to ever be. The whole crop of legitimate controversies was fully ripe for the judicial harvest. All interests called loudly for the chosen instrumentality for the work to grapple with the proffered task. In my opinion, the waste of energy and expense attributable to failure to do so might well have been avoided. It was according to precedent to take the course adopted, I confess. But should precedent efficiently bar the wheels of progress toward a more full response to such an appeal for judicial determination? It seems not.

This court can well view with satisfaction its progressive course as to meeting judicial controversies, squarely, casting aside the ancient method of dilatory, fencing, mere piece-meal decision, delaying the finality by technical dispositions, depleting to public and private resources and disappointing and exhausting to those resorting to the courts for redress and prevention of wrongs. There is room for further progress. Impatience with the law's delays, sometimes significantly manifested, will disappear without any change in the law of procedure by changes of method within the province of the court to make of its own motion, demonstrating that the fault supposed to exist is, in the main, in the administration of the law rather than in the law itself.

Seeming opportunity for worth-while progress is most inviting in cases like those before us. Where a new law which is questioned as to its meaning and its legitimacy in many important minor features as well as the dominant one,—a law of far-reaching character, materially affecting the people generally and bristling with complications, each presenting, from some reasonable standpoint, serious difficulty,—is brought early here for examination in all such aspects,—brought by the exercise of prerogative power so that all the people, as it were, are represented at the bar to the end that the enactment, so far as valid, may be vigorously enforced and cheerfully submitted to, and the mischiefs ordinarily flowing from such a course for a time and the law then being found full of infirmities, may be avoided, why should not the earliest opportunity afforded be willingly taken to carry the whole mass of things to the consultation room and patiently and finally solve the uncertainties, thus promptly affording peace to the state and its people in respect to the matter? The power exists to do it. Universal acclaim is in favor thereof. We are here to vitalize the power intrusted to us to do it. We have time therefor. We are as able now for the task as we probably ever will be. If we have not had as efficient help as we are likely to have at any future time, the power is ample to call for and obtain further assistance from eminent advocates of opposing theories. Then why hesitate? Is there any good reason for it?

I cannot perceive any satisfactory answer in the affirmative to the foregoing. Hesitation is largely from judicial custom to delay grappling with questions so long as possible, with the thought that time will either render doing it unnecessary or a decision may perhaps be later made under more favorable circumstances, and habit to minimize judicial labor where practicable without affecting the grade of it, to the end that each of the controversies brought here may have its due

proportion of attention. I confess the court's burdens are heavy and that the easiest way of escape from danger, if any exists, of which I must say I am not conscious of its being unduly so, is by limiting decisions to actual necessities of cases as they arise. That was for a time given as a sufficient justification for limiting activity of prerogative jurisdiction to a very narrow field and limiting it therein to the essentials of each particular situation. *State ex rel. Board of Ed. v. Haben,* 22 Wis. 101; *In re Court of Honor,* 109 Wis. 625, 85 N. W. 497.

While the scope of the prerogative power was early definitely stated and it has thus been maintained, if the burden of work here was ever a legitimate excuse for not exercising jurisdiction, within such scope, to make a full decision in a case thought to be of a character to warrant the court in stepping aside from its ordinary labor to entertain it at all, that ended long since. When such doctrine took root there were but three members of the court and the equipment for labor was very crude compared to that now afforded. There is certainly no longer need for leaving anything undone which might properly be done because of the burden of work.

So again the inquiry is suggested, why should not the court in all cases of great public interest, make the fullest practicable decision instead of leaving as much ground uncovered as practicable? In such a situation as this it seems that the court should not cease its labors till the whole subject in all important details shall have been exhausted. If any such shall not have been fully presented, or been overlooked, opportunity should be given, if help can be reasonably expected thereby, for further discussion at the bar, so in the end that the court may furnish executive officers and the people a plain, certain guide to go by. I urged that at first and again on the motion for rehearing. There are many important questions left undecided. Each may furnish ground for expensive liti-

gation. To settle all in detail will require large public and private expenditure which must be charged to waste. Conservation of time and money and peace, avoiding all such waste, can be effected by just a few days more time now, which could well be spared to devote to the matter.

A motion for a rehearing was denied March 12, 1912.

ESTATE OF KOCH. (Two appeals.)

December 5, 1911—March 12, 1912.

(1–12, 14–19) *Guaranty: Rights and duties of sureties: Contribution: Remedies, legal or equitable: Court and jury: Implied contract: Parting with right by contract: Breach of duty: Means of preventing loss:* Quasi-*trust: Constructive fraud: Security: Negligence: Evidence: Presumptions: Corporations.* (13) *Appeal: Affirmance and reversal.* (20–24) *County courts: Executors and administrators: Claims against decedent: "Adverse party:" Heirs: Guardian* ad litem: *Waiver of irregularities: Appeal: Notice.*

John C. Koch, Henry A. Koch, and another, owners or controllers of all stock of a corporation, guaranteed certain of its liabilities. Later such other became insolvent and dropped out. Later John C. bought Henry's interest on the basis of there being corporate assets over general liabilities of $77,500, the guaranty, as later claimed on the side of John C., not being mentioned, but, as claimed by Henry, being wholly assumed as between the two by John C. Some two years later John C. died, having till then controlled the corporation. Soon it was declared a bankrupt and found with assets only equal to about fifty per cent. of general liabilities. On behalf of John C.'s estate $35,272.55 was duly paid on the guaranty, and a claim therefor was proved in bankruptcy and compromised at less than half, Henry consenting without knowledge of a special benefit to the estate of $6,500. To his claim for balance due from John C. on the stock, the personal representative pleaded for contribution on the guaranty. The former pleaded an express extinguishment of the right in that regard, and loss of it through breach of duty as to the special exaction. Such plea was not sustained in county court but was on appeal.

A minor interested was permitted to appear in county court by guardian *ad litem*. The personal representative in appealing did not serve notice on such guardian. The appellate court permitted any irregularity in that respect to be, and it was, waived, so far as the guardian was competent to do so. The facts suggested were found on the appeal, except the pleaded surrender of the right of contribution and intent to defend as to the secret exaction. They were negatived. There were no specially found or pleaded facts, except as stated. The court found, generally, that contribution should be denied. The following rules apply:

1. There is, in general, a right to contribution between cosureties, not a mere privilege to be extended or not in judicial discretion.

2. Such right anciently originated in equity but now rests upon legal as well as equitable obligation and is enforceable at law or in equity according to circumstances.

3. Since such right depends upon established legal and equitable rules, given a situation within them, and a remediable right exists as matter of course.

4. The right being grounded, as indicated, upon the facts being found by court or jury, the former must apply the law, vitalizing the remediable character of such right.

5. The right of contribution between cosureties was given remediable character in equity with correlative rights, duties, and obligations in harmony with the rule that he who asks, must do equity,—in all constituting an entirety with natural dependable elements, fixing limitations and conditions.

6. The system established as indicated in No. 5 is now as obligatory on individuals in business relations, as any rule of action prescribed by written law, and regarded as automatically incorporated into every contract of guaranty, nothing appearing to the contrary, though not mentioned in its letter, and any breach thereof falls within the field of legal or equitable remedies, or both.

7. Such right, inchoate in character, exists from making the guaranty, rests in implied contract, and takes remediable character upon overpayment by one of his legal or equitable share of loss.

8. Such right being a creation of contract, may be contracted away, or lost, by a surety, in whole or in part, violating some duty owing by him to his cosurety.

9. A breach, by one surety, of his duty to his cosurety, causing loss to the latter, to that extent, is a legal and equitable defense in his behalf against any claim of the former for contribution.

10. Inhering in a joint contract of guaranty is an implied

mutual agreement that any special means of immunity from, or indemnity for, loss acquired by either surety shall be held and used, reasonably, for the common benefit of the bearers of the common burden.

11. A surety having control of means, as indicated in No. 10, is a *quasi*-trustee thereof for his associates with all incidental duties.

12. The right of contribution may be parted with by implied as well as by express contract, and the latter may be established circumstantially as well as by direct proof of contract stipulations.

13. A judgment,—right on facts found expressly or inferentially, or clearly established by competent evidence or evidence not excepted to, though not found at all or the facts pleaded,—will not be disturbed on appeal, since the real right is the end sought,—that appearing satisfactorily, it will prevail however irregularly or illogically, so long as not prejudicially, embodied in the judgment.

14. If a surety secures consent of his cosurety to a compromise of their joint claim against the principal obligor, without disclosing an advantage obtained in the transaction, the failure to disclose being without actual intent to defraud, he is guilty of constructive fraud, and is liable to share in some proper way the advantage with such cosurety.

15. If one of several sureties, all being owners, directly or indirectly, of the business and property which is the primary security for discharging the guaranty, buys the interest in such business of a cosurety at its net value, he does not, necessarily, by that, alone, lose his right of contribution against the vendee, nor does his subsequent failure to protect the security in case of continuing to control such primary security, constitute, necessarily, a wrong, forfeiting his right of contribution.

16. A purchase in the circumstances stated in No. 15 is strongly evidentiary, though not conclusive, of an understanding that the vendee shall not, as between the two, be held liable upon the guaranty.

17. In such circumstances, if the vendee continues to control the primary means for protecting the guaranty, he owes to the vendor the duty of exercising reasonable care to that end.

18. In the circumstances of No. 17, proof of loss of the primary security within such time and under such conditions as to raise an inference of negligent performance, or disregard of the cosurety duty, there being no explanation thereof, shows, *prima facie*, fatal negligence, forfeiting the right of contribution.

19. If A. and B. are substantially owners of all stock of a corporation, and joint sureties on a guaranty of its indebtedness, or part thereof, and A. buys B.'s stock, under such circumstances as to suggest a mutual understanding of there being a substantial excess of assets over general and stock liabilities, giving or contracting to give, pursuant thereto, full value for the stock, and A. thereafter controls the corporate assets, and, shortly, such assets are found not nearly sufficient to pay the general indebtedness, and there is no satisfactory explanation thereof, the presumption arises that he is guilty of having, through negligence or fraud, breached his duty to the corporation and his cosurety, which is fatal to any claim in his behalf against B. for contribution on account of payment of the guaranteed indebtedness.

20. In a hearing on claims in probate court, an heir is not an adverse party, in the practice sense,—the personal representative is such party as to the claimant.

21. Notwithstanding No. 20, an heir of the deceased may be permitted to appear, personally or by attorney, in such a hearing to protect his remote interest.

22. In case of permission as in No. 21, an heir is not an adverse party, in respect to an appeal from probate court, on which notice must be served.

23. A guardian *ad litem*, in judicial proceedings, may waive a mere irregularity therein, by permission of the court.

24. Filing of notice under sec. 4031, Stats. (1898), is the prime essential to appeal from a decision by the county court,—subsequent steps are of such minor character as to be waivable.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: F. C. ESCHWEILER, Circuit Judge. *Affirmed.*

Proceedings involving the right of contribution between cosureties.

Three persons, John C. Koch, deceased, *Henry A. Koch,* the respondent, and one Loeber, signed a guaranty of certain debts of a corporation in which all were stockholders. Subsequently, one became bankrupt and later a second bought the stock owned by the third, giving his promissory notes therefor. Later the vendee died, not having paid his notes, and leaving, as part of his estate, a controlling interest in the stock. Substantially all the balance of the stock belonged to his sons.

The estate was compelled to pay a large sum on the guaranty. Plaintiff made a claim against the estate for the amount due on his notes. The administrator for an offset, pleaded that the claimant was liable for his due proportion of the sum paid on the guaranty. Such offset was allowed in county court. It was disallowed on appeal to circuit court.

There was evidence offered to show the following: When the deceased took the stock of his cosurety there was property enough to pay off all the corporate liabilities, including liabilities to stockholders, and leave a surplus equal to seventy-five per cent. of the stock. After the purchase the deceased owned substantially the whole corporate property, so far as ownership of stock would accomplish that, and either he, or he and his children, so continued for some three years till he died. The property during this time was so dissipated that soon the corporation was duly declared a bankrupt and proved to have assets sufficient to pay less than fifty per cent. of the ordinary liabilities, leaving nothing for the stock. When deceased acquired such stock he promised, as a part of the transaction, that he would save the vendor harmless from the guaranty. The facts found by the court covered all these matters and others. The following is a summary thereof, omitting formal parts:

1. In 1887, John C. Koch, deceased, his brother, the plaintiff, and one Loeber formed a $50,000 stock corporation, the shares being $100 each, under the laws of Wisconsin, it being a family affair.

2. May 1, 1895, while deceased, plaintiff, Loeber, and a sister of the deceased owned all the stock, the first three signed a guaranty of the debts of the corporation, which continued in force till after payment thereon as hereafter mentioned, Loeber becoming in the meantime insolvent.

3. December 4, 1905, all the stock of the corporation was owned as follows: Deceased 260 shares, plaintiff 200 shares,

the corporation 30 shares, estate of the sister, deceased, 10 shares.

4. At such time deceased took over plaintiff's stock at the supposed and agreed value of $175 per share, giving therefor ten promissory notes of $3,800 each, payable one each year with six per cent. interest, at which time the amount of the guaranteed debts was $47,600.

5. At such time there was no express agreement or understanding that as part of the consideration therefor the vendee would protect the vendor as to the guaranty.

6. The death of John C. Koch occurred November 8, 1907, and February 4, 1908, plaintiff filed his claim in the settlement proceedings of the estate for $36,000, the amount due on the notes.

7. Shortly after deceased took over the stock, as aforesaid, he transferred 100 shares to each of his two sons, leaving in his own name 260 shares. Such ownership continued without further change till the death occurred as stated, and the corporation was duly adjudged a bankrupt in the federal court, which occurred in May, 1908.

8. After paying a dividend of five per cent. a composition settlement was had in the bankruptcy court of the balance of the indebtedness for forty cents on the dollar.

9. Prior to the adjudication in bankruptcy, the estate of John C. Koch was compelled to pay on the guaranty $35,272.55, for which a claim was duly filed in the bankruptcy proceedings, and on which the administrator received the five per cent. and the composition forty per cent., he joining in the latter proceedings with the approval of plaintiff,—leaving unpaid $20,101.61.

10. The administrator exacted, as a condition of joining in the compromise, that those promoting it should take over the corporate stock owned by the estate, paying therefor $6,500, which was done; plaintiff being ignorant thereof

though it was duly reported to the county court before being consummated and was duly approved.

11. The administrator did not make any false representations in respect to the matter aforesaid, or fraudulently omit to disclose anything to plaintiff.

12. December 9th there was left due on plaintiff's notes aforesaid $10,050.80 with interest from August 11, 1908.

On such facts the court concluded as matter of law that it would be inequitable to compel plaintiff to share in the loss caused by payment upon the guaranty, and that he was entitled to judgment accordingly, reversing that of the county court in part and giving him an absolute recovery against the estate of the deceased for $10,050.80, with interest and costs. Judgment was so rendered. [From that judgment an appeal was taken by *Charles E. Wild,* administrator with the will annexed of the estate of John C. Koch; also an appeal by the guardian *ad litem* of *Gretchen Ullrich,* a minor heir, legatee, and devisee under the will.]

For the appellant *Wild* there was a brief by *Flanders, Bottum, Fawsett & Bottum,* attorneys, and *James G. Flanders,* of counsel, and for the appellant *Ullrich* a brief by *J. O. Carbys.* The cause was argued orally by *James G. Flanders.*

Frank M. Hoyt, attorney, and *Thomas M. Kearney,* of counsel, for the respondent.

The following opinion was filed January 9, 1912:

MARSHALL, J. The judgment must be affirmed. Not because it is grounded upon altogether legitimate logic; but because it is right.

Compulsory contribution between cosureties does not rest in mere equity though, true, such is the origin of the law. The individual chancellor cannot, as an original proposition, do in each case what he may think will fit the facts from the standpoint of justice in the abstract. He cannot merely seize upon his ideal in the moral sense and vitalize it by a decree.

That would make contribution depend on arbitration in the habiliments of judicial administration. Contribution is dependable upon pretty definitely established legal rules, applicable to situations which may vary greatly as regards facts, but fall into pretty well defined general classes. The facts, dependable upon concession or evidence, or both, being found, the class and result are governed by the law. The court is to apply the law as it is given, not make it for the found situation. True, originally, there was a mere doctrine of contribution. True, like a great body of our law, it originated in judicial administration, unguided by written law or any rule, or anything but the chancellor's sense of justice and conception of means to effectuate it.

Doubtless, "sense of right developed sense of duty." Continuing the logic; sense of duty developed sense of moral obligation; sense of moral obligation, intensified by contemplation of the mischiefs incident to its violation, developed sense of necessity for compulsory responsibility; the latter developed sense of need for remedial justice. At that point of growth progress waited for its crowning effort. There was no written law to meet the case; none was offered. Then the boundless source of instrumentalities for coping with human transgressions, with its ready means, or power of invention thereof, for reparation of every wrong above mere moral infractions best dealt with by one's own conscience and sensibility to the rewards and punishments afforded by social environment; a source as limitless and fruitful as man's capacity to wrong his fellow men; that one in which has originated more of the beneficial regulations of human conduct found in the scientific ethics of the law, than in all the legislatures of a century,—equity, vitalized by its human conscience, furnished the needed remedy, recognizing the primary right, duty, and obligation with an environment of correlative rights, duties, and obligations, in all an entirety with mutually dependable elements fixing limitations and conditions.

The thought was that joint sureties, nothing appearing to the contrary, must naturally expect to share the burdens assumed, on a basis of equality and, as equality means equity, it was competent to enforce it in chancery. In such enforcement there was necessity for consistency, recognizing the universal rule that he only has enforceable equity who does equity. This latter was important, since it was seen that the ground of equity upon the one side raised the duty upon the other to share equally any advantages obtained, directly or indirectly, from the principals, as regards immunity from, or indemnity for, risk, and to use other advantages, such as actual control of the source for discharge of the principal obligation, with reasonable care and for mutual benefit.

So from the very nature of the matter the whole subject of contribution was at first and for a long time dealt with solely in equity, taking, however, more and more, with the lapse of time, the form of a definite judicial code, appropriate to a proper standard, in moral conception, of business ethics. Those rules, being well established and universally applied with quite as much certainty as legal rules, strictly so called, or rules dependable upon written law, came to be regarded as automatically written into every contract of guaranty, nothing appearing efficiently to the contrary, and enforceable at law as well as in equity.

Now the logic of the enforceability of contribution, at law as well as in equity, is that there is a real right of contribution growing out of the relations of the parties, not a mere privilege to be extended or not in judicial discretion. The right may be contracted away or lost by violation of some correlative right, but it is not within the province of the court, as an original matter, to give it or to take it away. The right, inchoate, has its inception at the time of signing the guaranty. It sleepeth, so to speak, till aroused into life, by compulsory payment by one of more than his share of the loss. Upon others refusing to make good, there is a violated right creat-

ing a cause of action of legal or equitable cognizance, or both. That cause of action is defendable against by a violated right, in case of there being any; having regard to the equitable duties of the parties to each other as established in the law, and in contemplation of which they are presumed to have agreed in joining in the guaranty. The idea is not that any express contract exists between cosureties upon which an action will lie, but that there is a contract implied, growing out of the relations of the parties,—a contract which is contemporaneous with the signing of the guaranty, not which springs up by overpayment by a surety. The latter merely fixes the right in accordance with the implied contractual obligation made at the start, that the solvent resident guarantors will share equally any loss resulting from the suretyship.

Said this court in *Hardell v. Carroll,* 90 Wis. 350, 63 N. W. 275, quoting from a standard author:

"The right of contribution is an equity which springs up at the time two or more persons assume as to each other the relation of cosureties for a common principal, and ripens into a cause of action when one of the sureties pays more than his proportion of the debt for which all were liable."

While it is an equity the right to the equity is legal as well as equitable, because the parties are presumed to have agreed that the right shall exist, and so legal as well as equitable remedies are available to redress its violation. *Mason v. Pierron,* 63 Wis. 239, 23 N. W. 119; *Bushnell v. Bushnell,* 77 Wis. 435, 46 N. W. 442; *Faurot v. Gates,* 86 Wis. 569, 57 N. W. 294; *Boutin v. Etsell,* 110 Wis. 276, 85 N. W. 964; *Fanning v. Murphy,* 126 Wis. 538, 548, 105 N. W. 1056.

"The liability of a surety to contribute to one who has paid more than his share of the common debt, is one that is now recognized and enforced both at law and in equity."

"The time was that the paying surety in an action could only recover from his cosurety an aliquot part of the whole debt; regard being had to the number of sureties, and without regard to the insolvency or nonresidence of any of them. The

considerations before mentioned induced a modification of this rule, so that it may be said to be established law in this state, as well as others, that, when one surety has paid the whole debt, he may compel contribution from such of his cosureties as are solvent and within the state." *Boutin v. Etsell, supra.*

"In contemplation of law, the act" of payment by a surety, the principal having defaulted, "is characterized by a request from the cosurety, if there be such, to the one acting in the matter to pay the debt, and a promise on the part of the former," implied from the obligation assumed to have been entered into at the start, "to contribute his proper proportion. Thus a cosurety is liable to contribute to the one making the payment, both upon the ground of equitable and legal obligation." *Fanning v. Murphy, supra.*

As before indicated, the right of contribution may be parted with to cosureties by contract, or lost to the extent that prejudicial breach of duty to the cosureties would otherwise proximately cause loss to them, and may be forfeited in some other ways definitely established in the law.

Consistent with the principle that each surety, impliedly, by joining in the guaranty, contracts not to take any special advantage, growing out of means of immunity from, or indemnity for, loss, secured from the principal during the existence of the contract of guaranty, and to reasonably conserve for the common protection property of such principal under his control, forming a legitimate means of such protection, it has been held as follows: Where a surety bought in the principal claim at a discount he can only claim contribution as to the amount paid. *Tarr v. Ravenscroft,* 12 Gratt. 642; *Derosset v. Bradley,* 63 N. C. 17. A surety who pays in depreciated currency can only have contribution on the basis of its value, such currency not being a legal tender. *Edmonds v. Sheahan,* 47 Tex. 443. A surety who receives security from his principal, although the latter intends it specially for the individual benefit, is required to apply the same for the benefit of all. *Fuller v. Hapgood,* 39 Vt. 617, 620.

A cashier of a bank in which a principal obligor is a depositor who is an associate surety for a liability of such principal, having received a check from such principal on his account in the bank to discharge such obligation, which he negligently for some days omits to efficiently use by transmitting the money as requested, and in the meantime the bank fails, causing the principal debtor to make default,—is, by reason of breach of duty to his cosureties to use his special knowledge of the situation and instrumentalities placed in his hands to protect all, liable, as between them, for the entire loss. *Crisfield v. Murdock,* 127 N. Y. 315, 27 N. E. 1046. A cosurety who receives indemnity must share it with his associates and, if having full indemnity he releases it, he forfeits the right of contribution. *Sherman v. Foster,* 158 N. Y. 587, 594, 53 N. E. 504. If a cosurety takes a chattel mortgage to indemnify himself and voluntarily discharges it without consent of his associates, they may efficiently plead such discharge as a legal defense to a claim against them for contribution. *Ramsey v. Lewis,* 30 Barb. 403. If a surety procures, or negligently allows, forced sales of the principal debtor's property and buys it in at a manifestly inadequate price, he is chargeable with the full fair value as regards his right of contribution. *Sanders v. Weelburg,* 107 Ind. 266, 7 N. E. 573. If a cosurety obtains from the principal a mortgage upon chattels, in form to secure himself against loss by reason of becoming a party to the surety contract, he thereby becomes a trustee of such security for the benefit of all the sureties, and if he loses the advantage by negligence, he commits a wrong to his associates, remediable by forcing an accounting as to the security, charging such loss to him, or by way of defense to his claim for contribution. *Steele v. Mealing,* 24 Ala. 285; *Taylor v. Morrison,* 26 Ala. 728; *Caryton v. Johnson,* 27 Ala. 503; *Paulin v. Kaighn,* 29 N. J. Law, 480.

All such instances were ruled by settled results, in the law, for violations of recognized duties,—not by the court's mere

conception, in any case, as an original matter, of what was just.

We are compelled, seemingly, to go elsewhere for illustrations of the principles above stated. Though there is an abundance of instances where they have been applied, there is dearth of such in the history of our own jurisprudence. Such principles are so well entrenched, as of legal as well as equitable cognizance, that modern text-writers turn the matter off by the mere statement that "the right to contribution may be destroyed by a subsequent contract of the parties, or by the fault of the party who causes the loss toward which he seeks contribution from his co-obligor." 9 Cyc. 804.

Of particular significance here is the fact that both in law and equity, a cosurety is a *quasi*-trustee for his associates of all special advantages he acquires from the principal debtor,—either in adversary proceedings or otherwise,—for the benefit of the bearers of the common burden, with all the duties incident to such relation. He cannot specially profit out of it. He is liable for loss proximately caused to his associates by failure to honestly and with reasonable care perform his legal duty to his associates,—to reasonably conserve his special advantages for the common benefit; this having regard to acts of omission as to facilities under his control, or commission respecting fraudulently or negligently dissipating the means of paying the principal debt, or indemnity for losses occasioned by failure to pay,—especially indemnity derived from the business regarding which the liability has its origin. The duty in this regard is as strictly legal, though based on equitable principles, as it is plainly moral.

The foregoing, somewhat lengthy discussion, is for the purpose of showing that, upon the facts appearing, vitalizing, in the absence of anything of a defensive character, the right of contribution, what is matter of defense is dependable upon definite legal principles though they may be founded in equitable considerations. The inquiry is, Was the right parted

with by contract, or was it, in whole or in part, forfeited by breach of duty of some sort? What breaches, in general, constitute a defense to the claim for contribution, are well defined in the law,—so well that the facts being found, whether they constitute a defense or not, is matter of law, not matter of discretion. The issues may be presented in a legal or equitable action. If the latter, the court finds the facts and applies thereto the established rules of law. In the former, the jury find the facts from the evidence, as in any other case, and the court applies thereto, subsequently, the appropriate rules of law, or directs the jury how to find as a result of their determination of the controverted facts, according to whether the verdict is special or general.

Turning to the answer of respondent to appellant's claim for contribution, we find that the pleader grounded the defense on, *first,* a claim that when John C. Koch took over respondent's stock it was expressly mutually agreed, as part of the transaction, that the former should hold and save harmless the latter from all liability on the guaranty, and see to it that the obligee became a party thereto; *second,* the claim that, in the composition proceedings in bankruptcy of the corporation, the appellant, as personal representative of John C. Koch, obtained a secret advantage, in that, after securing respondent's consent to a compromise of the claim made on account of payment of the guaranteed debt, he exacted and obtained $6,500 for the worthless corporate stock, as a condition of joining in the composition. Thus no fraud or wrong, in that John C. Koch failed to reasonably, as regards respondent, conserve the assets of the corporation to protect the cosureties, was pleaded or, seemingly, thought of.

The evidence disclosed many facts giving rise, as we shall see, to a further defense which might have been pleaded at the start or insisted upon at the end. The circumstance that it was not so pleaded or insisted upon, or, perhaps, thought of at all, or if thought of to some extent, was not appreciated,

makes no difference now. If the judgment be right, as indicated at the outset,—right on facts found, expressly or inferentially, or both, or not found but appearing clearly from the evidence,—it must be sustained. The real right of the matter is the end to be attained in our system of jurisprudence. That being clear and having been arrived at without substantial prejudice to the adverse party, justice is satisfied however irregularly or illogically the judicial footsteps may have moved in reaching that goal.

The court found, specifically, in appellant's favor as to whether there was an express contract relieving respondent, as between the two parties to the transaction, from the burden of the guaranty,—found that no such contract was made. It is insisted, on the part of respondent, in support of the judgment that such finding is against the clear preponderance of the evidence. It is legitimate to make that claim. It is not so void of merit as to be unworthy of consideration.

The court seems to have reached the conclusion that the contract alleged to have been made never existed, from the evidence of what was said, expressly, between the two Kochs when the transaction in regard to the sale and purchase of the stock took place. There was but one witness to that who testified upon the trial,—the son of John C. Koch. He was an interested witness,—interested, as he came to definitely understand, in having it held that there was no contract. His evidence, from first to last, was somewhat contradictory. From one viewpoint, examined apart from corroborating circumstances, quite self-destructive. The trial court heard him give his testimony on one occasion and his effort, then, to square himself with what he had testified to on a former occasion, and came to the conclusion that his evidence in the whole was not sufficient to raise the burden of proof, which was on respondent, to establish the defense of contract surrender of the inchoate right of contribution.

We are somewhat constrained to the view that too little

weight in favor of respondent was given to the evidence referred to, and too little weight to the significant circumstances corroborating the oral evidence directly tending to establish the defense of contract. However, in deference to the rule requiring findings of fact by a trial court to be sustained unless clearly wrong, giving due weight in their favor to the superior advantages of the trial jurisdiction for reaching a right conclusion, we pause before passing the point of condemnation. With what has been said we may well leave this branch of the case, especially, since the result reached on another branch renders going further unnecessary. Really, whether the finding has efficient support in the evidence might have been passed altogether, but it seemed due to counsel who very carefully briefed the matter as one of primary,—of vital significance,—to discuss it at some length, omitting, however, reference to the evidence in detail; speaking thereof only in general character and effect, which omission would be supplied before going to the length of overruling the decision.

It seems that the findings were intended to strictly follow the claims of respondent as to a contract defense. Only an express contract was claimed. The learned trial court thought only of an express contract, expressly made, in the technical sense. Only that seems to have been specially and plainly passed upon, as appears more clearly from the opinion filed by the trial judge than by the findings. It was not essential to the defense of express contract that it should be established to have been made by use of express language.

The findings are not altogether satisfactory on this branch of the case. If the judicial thought was either that respondent was confined to proving an express contract, in the technical sense, because only such would be efficient in any event, or because respondent elected by his pleading to stand on that, or through inadvertence or other reason he omitted to prove that a contract was otherwise made, as by an inference of fact from all the circumstances of the transaction,—that is wrong.

All the evidence there was bearing on the question being before the court without objection, if by reasonable inference, or circumstantially, a contract was established to the effect that John C. Koch would protect respondent from the guaranty, the latter should have been awarded the benefit of it. We are inclined to think that a contract was so, pretty plainly, established. If we were compelled, in reaching a final conclusion, to pass upon whether such matter was really intended to be affirmatively covered by the findings, and the result were in the negative, without much hesitancy, if any, it is thought, we should find that the reasonable implication from all that occurred in the purchase and sale of the stock, is that the minds of the parties contractually met to the effect that, as between respondent and John C., the latter should alone bear the burden of the guaranty. If the result were that it was intended to be covered negatively, the finding could not be sustained without difficulty,—not, at least, without going to the limit of according dignity to the decision of the trial court as to matters of fact. For the reason before given in regard to the finding as to the express contract feature, in the restrictive sense, we need not pursue this further or go into details as to the evidence and circumstances uncontrovertibly established thereby, which point, quite as persuasively, to the existence of a contractual meeting of minds as would plain contractual words.

What particular significance, in the legal conclusion, was given to the circumstance that appellant, as a condition of participation with the estate in the composition proceedings in bankruptcy, exacted and obtained for the estate $6,500 for the worthless corporate stock, does not appear. The court freed appellant from any imputation of fraudulent purpose in failing to disclose to respondent the secret advantage obtained, and exonerated him from having made any false or fraudulent representations to induce the former to consent to compromise regardless of the secret advantage. The learned

court seems to have thought that, if all the representations made by appellant to respondent were true, and the facts not disclosed were withheld without any real purpose of cheating respondent, and under such circumstances the latter gave his consent, he did it at his peril. In this, it does not clearly appear whether the court treated the two as persons who met and dealt in the attitude of, "at arm's length," in the business transaction, as in ordinary matters of contract, or not. The indications are in the affirmative. If that were the judicial thought, and it entered efficiently into the final result, to that extent such result is wrong.

As indicated, the relations between respondent and appellant in reference to the guaranty were those of trust and confidence. In the very nature of the case they could not meet or deal "at arm's length" unless by mutual consent. They met as bearers of a common burden, conceding for the time that respondent was held under the guaranty, and entitled to share fully in each other's confidence and advantage. It was not enough that appellant stated to respondent, truthfully, what he attempted to state and therefrom the latter formed his judgment to consent to the compromise. It was not enough, that in failing to disclose the secret advantage appellant had no thought of wronging respondent. He owed to him the duty of full disclosure. Failure to perform was a manifest breach of that duty,—a fraud in law, a remediable wrong, and, as such, a defense to the claim for contribution to the extent that respondent was damaged, and, in any event, to the extent of liability to account for the full amount of the secret exaction by applying it for joint benefit upon the loss suffered under the guaranty,—this upon settled principles heretofore discussed and declared.

We have reached the end as regards matters of fact, seemingly passed upon by the trial court. The general conclusion was that "under all the circumstances in this case it would be inequitable to require the said *Henry A. Koch* to contrib-

ute," etc. It does not appear to be grounded on any definite breach of duty specifically covered by the findings of fact. It does not seem to have been appreciated that a legitimate basis in contract, or some breach of duty, was necessary,—in other words, that the judgment denying the right of contribution needed something to rest upon beside the mere discretion of the court, unless it were thought that the mere circumstance by itself that John C. Koch purchased respondent's stock at full value rendered him as matter of law equitably liable to bear the whole burden of the guaranty, regardless of any contract or breach of duty. There is neither precedent nor principle for that.

John C. may have taken the stock believing it was worth all he gave and been mistaken, or in so believing counted, as an element of value, on the advantage to the corporation of the continued existence of the joint guaranty, or the property have been in fact worth all he supposed and, through misfortune or causes not attributable to any want of reasonable diligence on his part, the business have become worthless, or all the results happened leading to enforcement of the guaranty without breach of duty on his part to respondent. With no contract surrender of the right of contribution, nor any breach of duty which John C. owed to his cosurety, found, there was no legitimate basis for the conclusion, in the letter of the decision as to facts. The case was not one for judicial arbitration, but for judicial disposition upon settled principles. Wherein did John C. Koch wrong respondent? Wherein is there breach of duty of the former to the latter which, under the law, constitutes a defense to the claim for contribution? The findings of fact, as indicated, are silent as to that, so far as they speak specifically. Are they thus silent, speaking inferentially and circumstantially? If not, and an inference of fact plainly arises, *prima facie,* from the specific facts found, that John C. Koch breached his duty to respondent as cosurety, and thus the default

happened which caused resort to the guaranty and loss to the sureties,—if he might and would, but for negligence or other inexcusable fault in performance of his duty to reasonably conserve the advantages he enjoyed as controller of the corporation's business, to protect the guaranty and which but for such fault would have been protected, have prevented loss to the sureties,—that is a legal, moral, and equitable defense to the claim for contribution.

We repeat, the circumstance, if such be the fact, that the trial court did not appreciate the foregoing and so made no finding with reference to it, does not militate against the efficiency thereof as a defense, if such fact plainly appear. It was the most significant matter in the case after passing the contract feature, and should have been dealt with as matter of fact, following the numerous circumstances found in much detail, and others shown conclusively by the evidence which might have been found, if mere matters of detail upon which the main fact was dependable, were to be covered.

On this vital branch of the case we do not overlook the distinction between the relations of partners and stockholders to each other, and associates in each capacity and the common property. We need not do more than make this passing reference to matters discussed in that respect in the briefs of counsel. They are not considered material because of the conclusion which seems inevitable.

At the time respondent and John C. had their stock deal, the two were, as clearly shown by the statement, virtually, though not directly, the owners of substantially all the corporate property. They controlled it as absolutely as if they had owned every dollar of outstanding stock, which they did in practical effect,—that is either as sole or trustee owners, the latter status only covering ten shares. They could have suspended operations, paid off the indebtedness, and surrendered their corporate charter at any time. *Prima facie,* they could have done so, paid all ordinary and stock liabilities,

and had somewhere around $37,500 left over; indicating possession of assets of the value of $150,000 or more. That such value was real is evident from the fact that respondent sold his stock on that as a cash basis. The exact amount of gross assets does not appear even by aid of a full statement of indebtedness. That all ordinary indebtedness was taken into consideration and with that provided for $87,500 was found left over, and so formed the basis of the stock trade, is evident from the findings and undisputed evidence. After the trade the whole corporate property, to all intents and purposes, became the individual property of John C. It was primarily liable for payment of the corporate indebtedness, including that covered by the guaranty. So his interest was subject to the paramount right of creditors. He was liable to the corporation and through it for the benefit of its creditors, for common care and honesty in administering the property. Thus such property so controlled was the primary source for protecting the guaranty. It was as virtually under his power as if he had possessed a chattel mortgage on it, as was the circumstance in several of the cases heretofore cited. In that situation he owed the duty, as we have seen, to his cosurety of a *quasi*-trustee of his advantageous position. If he dishonestly or negligently rendered the primary source for discharging the guaranteed debts insufficient therefor, he breached his duty to his cotrustee and incurred the legal, equitable, and moral liability to lose his inchoate right of contribution. There is no rule better established in the law of suretyship than that, the cosurety whose wrongful conduct causes default, rendering resort to the guaranty necessary, and producing loss to the sureties, cannot have contribution, so far as loss was thus produced.

How did John C. Koch perform his duty, mentioned, to respondent? The fact, if it be a fact as the court found, that the latter did not protect himself at the time of the stock trade by an express definite contract as regards the guaranty, only emphasizes the trustee status of John C. to conserve his

advantageous position for the bearers of the common burden, and shows that respondent relied wholly upon performance of that duty.

For nearly a year after the stock transaction aforesaid, John C. was sole master of the corporate situation. Then he transferred about two fifths of the stock to his sons, thus continuing in virtual control and the corporation exclusively his family affair,—evidently a convenient instrumentality for holding and investing the family property, and probably acquired for that purpose. That is the natural inference from the persistency with which John C. urged respondent to leave the corporate business solely to him. He continued to control the policy of the corporation till he died. On the face of things,—no explanation whatever having been offered by evidence,—with more than twice property enough at the start to pay all liabilities, ordinary and stock as well,—he so handled the situation as to cause the default and loss. He did that in the brief period of less than three years. At the end of that time there was nothing left of the prosperous corporation with stock worth seventy-five per cent. above par, of less than two years before, but a mere wreck to be wound up a short time later in bankruptcy, where a loss of property equal to some three times the face value of the capital stock, developed. Where did all that property go to in the brief space of time? How could it have been so dissipated without a most flagrant breach by John C. of duty to his cosurety and to the corporation as its managing officer? With no explanation of such strange shrinkage of assets,—and there is none in the record,—John C. Koch, deceased, stands, by necessary inference, convicted of such breach. With such a showing the burden was upon appellant to make a full explanation, exonerating deceased from the apparent dereliction. The status was very much like that of a trustee, when called upon to account, charged with trust property, unquestionably traced into his hands.

It is futile to argue that John C. did not own the property

or possess it as security. Though he did not, in the technical sense, he did in all substantial sense, and his duty to his cosurety is plain. The breach of it is plain. The legal liability of forfeiture of the right of contribution is quite as plain. Facts in that regard should have been expressly, as they are inferentially, embodied in the findings, followed by a declaration as a legal result, and equitable as well, that the claimed right of contribution was illegitimate. If appellant here had brought suit at law against respondent for contribution, the facts indicated could have been pleaded as a perfect defense. If upon the trial they had appeared as plainly as now, it would have been the duty of the court to have granted a nonsuit or direction of a verdict of no cause of action, especially if requested. Had some, but not a full satisfactory explanation been made of the apparent breach, it would have been the duty of the court to have sent the case to the jury for a verdict in accordance with their finding as to the facts, regarding whether John C. Koch negligently or otherwise dissipated the property of the corporation, or permitted it, while it was under his control, and so brought about the loss upon the guaranty.

The foregoing seems so plain, the wonder is that appellant could have expected to recover on the obligation of contribution once existing, without making the suggested explanation. We must presume that this phase of the case, very plain as it seems to be and likewise its fatal character as indicated, did not occur to appellant or his counsel. They went down to the trial on the first, and second occasions and persisted here, upon the theory that the only matter of clear efficient defense pleaded was the express contract, and that the case would stand or fall on that. They were warranted in so thinking, as regards any disclosure of attitude by their adversary, or that of the court, so far as the result is grounded on any specific finding of fact clearly warranting it.

A question is raised by an appeal from the judgment taken

by a guardian *ad litem* who appeared for two minors having some interest in the litigation. Such guardian participated in the trial in county court. In taking the appeal to the circuit court he was not treated as an adverse party by service on him of the notice thereof. Upon the matter being brought to the attention of the appellate court, and after expiration of the ordinary time for serving notice where that is necessary, that court, in effect, permitted the guardian to waive all irregularities in that regard, and the guardian consented to do so to the extent his duty would permit. The record by petition and order was made accordingly, and pursuant thereto the guardian participated in the second trial.

The whole case was removed to the circuit court on the seasonable service of notice of appeal upon the personal representative of deceased. He stood for all interests. The guardian did not appear in the county court contest as matter of right. There is no rule of court or statute or unwritten law affording such right. It was proper for such court to recognize the interests of the minors in the special way it was done, but that did not give their special representative any control of the litigation. He was not a party in interest as in *Tyson v. Tyson,* 94 Wis. 225, 68 N. W. 1015. However, being recognized to specially conserve the somewhat remote interests of minors, the ordinary duties of the position, as suggested in *Tyson v. Tyson, supra,* applied.

This was not a case where a guardian was essential to jurisdiction. The only necessary party adverse to the claimant was the personal representative. All interested in the estate, in the collective sense, really the estate itself, vitalized by such representative, was the only adverse party to the claimant in the matter of the hearing on claims, and upon him notice of the appeal from county court, as required by sec. 4033, Stats. (1898), was duly served.

The guardian *ad litem* was permitted to appear after the nature of *amicus curiæ,*—recognized as such by reason of

the remote interest of the minors. A person having such a status is not an adverse party within the meaning of the statute, who is entitled to recognition as such in appeal proceedings. 2 Ency. Pl. & Pr. 159.

However, we quite agree with counsel for respondent, that it was competent for the guardian, by permission of the court, to waive any irregularity there might have been in failing to recognize him as a party in the appeal proceedings. Such irregularities are waivable either expressly or by conduct. *Kasson v. Estate of Brocker,* 47 Wis. 79, 1 N. W. 418. The jurisdictional feature of the appeal statute, as regards county court matters, is in sec. 4031, Stats. (1898), which provides that any person aggrieved by a decision of the county court "may appeal therefrom to the circuit court . . . by filing a notice thereof with said county court within sixty days from the date of the act appealed from, . . . together with such undertaking as is required" by sec. 4032. Thus the prime essential, as said in *Charmley v. Charmley,* 125 Wis. 297, 301, 103 N. W. 1106, is the filing of the notice of appeal within the time required. Compliance even with the requirement as to filing the bond has reference to perfecting the appeal which may be done somewhat irregularly and yet be sufficient. *Perkins v. Shadbolt,* 44 Wis. 574.

So from any viewpoint, the judgment rendered below and affirmed here, is binding on all parties interested in the estate, including the minors represented by the guardian *ad litem.*

By the Court.—The judgment is affirmed on both appeals.

A motion for a rehearing was denied March 12, 1912.

VOGEL, by guardian *ad litem*, Respondent, vs. HERZFELD-PHILLIPSON COMPANY, Appellant.

December 5, 1911—March 12, 1912.

Master and servant: Personal injury: Contributory negligence: Incompetency of fellow-servant: Proximate cause: Evidence: Questions for jury: Special verdict: Instructions to jury: Excessive damages: Appeal: Harmless errors.

1. In an action by a minor servant for injuries received in falling from a freight elevator, although he had himself opened the gate and the evidence strongly tended to show that the accident was caused by his attempting to leave the car while it was in motion, yet, the jury having given credence to his denial of such attempt, it cannot be said as a matter of law that he was guilty of contributory negligence.
2. Age may be an important factor in determining the competency of a servant; and where he has just passed the age at which he could legally be employed the other facts needed to show his incompetency may be few and in themselves insignificant.
3. Thus, in the case of an elevator boy sixteen years and seven months of age, proof that in size and weight he was below the average boy of his years and that he was somewhat pale and nervous, together with testimony tending to show that he got tired toward evening and occasionally stopped the elevator too suddenly, causing it to bound, was sufficient to sustain a finding of incompetency.
4. Evidence that such elevator boy smoked cigarettes and that he did not have enough to eat was not admissible to show negligence on the part of his employer in retaining him in such employment, where no actual or presumptive knowledge of these facts on the part of the employer was shown.
5. Where, on appeal, this court is not satisfied that the result would probably have been different had improper evidence been excluded, the judgment will not be reversed because of the admission of such evidence.
6. Evidence tending to show, among other things, that an elevator boy sixteen years and seven months of age, mistakenly assuming that plaintiff was about to leave the car while it was running past the third floor, stopped it so suddenly as to cause it to bound and throw plaintiff off, was sufficient to warrant the jury in finding that the negligence of such elevator boy was the proximate cause of plaintiff's injury.

7. It was not error to refuse to submit for special verdict a question as to a fact not specifically pleaded, bearing upon the plaintiff's contributory negligence, where the charge dealing with that subject practically covered the same ground.
8. Refusal to give a requested instruction calling attention specifically to plaintiff's interest in the result, as bearing upon the weight and credibility of his testimony, was error; but under sec. 3072*m*, Stats. (Laws of 1909, ch. 192), there having been a general instruction on the subject, covering the testimony of all the witnesses, the error is *held* not a ground for reversal.
9. An award of $3,600 to a minor injured by a fall of thirty-eight feet down an elevator shaft, he having been severely hurt and there being some evidence of permanent injury, is *held*, though very liberal, not so excessive that this court should interfere.

APPEAL from a judgment of the circuit court for Milwaukee county: CHESTER A. FOWLER, Judge. *Affirmed.*

The plaintiff was an employee of the defendant and brings this suit to recover damages for injuries sustained while riding in a freight elevator in defendant's store. The alleged negligence on the part of the defendant consisted in employing an incompetent person to operate the elevator. The act which it is claimed was responsible for plaintiff's injury consisted in bringing the elevator to a stop suddenly, so that it bounded and threw the plaintiff off the platform and down the elevator shaft. The trial resulted in a verdict and judgment for the plaintiff. The defendant contends that plaintiff was guilty of contributory negligence as a matter of law; that there was no evidence which warranted the jury in finding that the defendant was negligent; that there was no evidence to sustain the finding of the jury that the alleged negligence on defendant's part was the proximate cause of plaintiff's injury; that the court erred in admitting evidence prejudicial to the defendant; that the court erred in its charge to the jury; that the court erred in refusing to submit to the jury a question propounded by the defendant; and that the verdict is excessive.

For the appellant there was a brief by *Doe & Ballhorn,* and oral argument by *J. B. Doe.*

For the respondent there was a brief by *Charles E. Hammersley,* attorney, and *Doerfler, Green & Bender,* of counsel, and oral argument by *Mr. Hammersley* and *Mr. C. Doerfler.*

The following opinion was filed January 9, 1912:

BARNES, J. There was evidence from which the jury might have found that the sign forbidding all persons except the operator to manipulate the gates was not in use at the time of the accident or for some time before. There was also some evidence from which the jury might have found that the employees of the defendant, other than the operator, customarily raised and lowered the gates of the freight elevator. There was apparently no particular danger to be apprehended from opening the elevator gate by a person riding in the elevator, provided no attempt was made to get off while it was in motion. The jury no doubt acquitted the plaintiff of attempting to leave the car while it was running, and although the great preponderance of the evidence was to the effect that such action on plaintiff's part was the cause of his injury, yet the jury might and no doubt did give credence to the evidence of the plaintiff, and he denied that he undertook to leave the elevator while it was moving. The fact of contributory negligence on the part of the plaintiff was not so clearly established by the evidence that a court should say as a matter of law that there can be no recovery because of it.

The jury found that the elevator boy, Van Paine, was an incompetent servant, and this is the sole ground of negligence relied on to support the judgment. The appellant contends that Van Paine was not incompetent, and that, if he were, it had no notice, actual or constructive, of such incompetency. Van Paine was sixteen years and seven months of age at the time of the injury to plaintiff. His size and weight were below that of the average boy and he was somewhat pale and nervous. Aside from these facts which the defendant either knew or should have known, there was little evidence of incompetency on the part of Van Paine. The court errone-

ously allowed the plaintiff to show that Van Paine smoked cigarettes. There was no pretense that defendant was aware of that fact, and the evidence is undisputed that smoking was forbidden at the store, and no claim is made that Van Paine smoked there. Defendant was not obliged to shadow its employee to ascertain whether he smoked. The court also erroneously permitted Van Paine to testify that he did not get enough to eat during the time he was working for defendant. This evidence would be proper enough if the defendant was feeding the boy, but it was not, and there was no claim that defendant knew that the relative with whom Van Paine boarded was starving him. This evidence, offered for the purpose of showing negligence on the part of the defendant in retaining Van Paine in its employ as elevator boy, could only be made competent by showing actual or presumed knowledge on the part of the defendant of the facts testified to. Such evidence might well operate to the disadvantage of the defendant. We are not satisfied, however, that the result would have been different had this evidence been excluded, so we decline to reverse the judgment because of its admission. The other evidence of incompetency on Van Paine's part prior to the time the plaintiff was injured was given by himself. He was an accommodating and in a sense an impartial witness. When answering questions for plaintiff's counsel he made out a strong case of incompetency during all the time he ran the elevator. When answering questions for defendant's counsel he made out a good case of competency. Perhaps a jury would be warranted in drawing the inference from his testimony that he got tired toward evening and occasionally stopped the elevator too suddenly, which would cause it to bound. Leaving out of consideration the matter of Van Paine's age, there was very little evidence of his incompetency. No one who ever rode with him was produced to show that he did not run the elevator in the proper way, and two witnesses who frequently rode with him testified that

he operated it properly. But this court has decided that age may be an important factor in determining competency. The facts in addition thereto that must be shown to establish incompetency, where the employee has just passed the age where he can be legally employed, may be few and in themselves insignificant. *Zabawa v. Oberbeck Bros. Mfg. Co.* 146 Wis. 621, 131 N. W. 826. The facts tending to show incompetency, aside from age, are more persuasive in this case than in the *Zabawa Case,* and we must therefore hold that the evidence presented a jury question.

The closest question in the case is whether there was any evidence which warranted the jury in finding that the incompetency of Van Paine was the proximate cause of the plaintiff's injury. However incompetent Van Paine might have been at other times, the evidence to show any actionable negligence on his part in the management of the elevator at the time plaintiff was injured is slight. There were three persons besides the elevator boy on the elevator when it left the first floor. Two of them were going to the fifth floor, while the plaintiff intended to get off at the third floor. He did not advise the elevator boy of this fact, but the latter knew where he worked and where he intended to get off. Van Paine testified that he stated before leaving the first floor that he would take the two parties up to the fifth floor first and leave plaintiff at the third floor on the return trip. The jury might have been warranted in finding that this conversation did not take place, but, whether or not it did take place, Van Paine did not intend to stop the elevator at the third floor until after he went to the fifth floor. There is evidence in the case from which the jury might have found that there was a perceptible slackening of the speed of the elevator as it approached the third floor, so that one might be led to believe that it was going to stop there. The plaintiff stepped to the door of the elevator about the time it reached the third floor and placed his hand under it and slid it up, looked at the elevator man,

and said "Hey." He testified that thereupon the elevator was brought to a sudden stop, causing it to bound, and that the bound threw him off his feet, and that he fell down the elevator shaft and was injured. The evidence of other witnesses strongly tends to show that the plaintiff was injured by reason of attempting to get off the elevator while it was in motion, and that he had fallen before it was stopped. But the jury had a right to believe the testimony of the plaintiff, if they considered it more credible than that of the other three witnesses who were in the elevator. The appellant argues that in any event Van Paine had a right to act on appearances, and that he was justified in believing from the action of plaintiff that he intended to get off the elevator whether it stopped or not, and, this being the case, the elevator boy very promptly stopped it as quickly as he could. The plaintiff testified that he did not intend to get off the elevator while it was moving; that he supposed the elevator boy would stop when he reached the third floor; and that what he did was done in the way of preparation to leave the car when it came to a standstill. While it may have been a negligent act on the part of the operator to attempt to run the elevator to the fifth floor without stopping, when he knew that one of the occupants intended to get off at the third floor, it could not be reasonably anticipated that a person riding thereon would undertake to leave the car while it was in motion, and the actionable negligence, if any there was, arose out of the fact that the elevator boy was wrong in assuming that plaintiff intended to leave the car while it was moving and was therefore at fault in stopping it so suddenly as to cause it to bound and throw the plaintiff off. The court is of the opinion that the jury might reasonably have inferred from the evidence that the operator was negligent in stopping the elevator so suddenly as to cause it to bound, and that such negligence was the proximate cause of plaintiff's injury.

The defendant requested the court to submit the following question to the jury: "Was the plaintiff warned before the accident by a sign on the gate, or otherwise, not to raise the elevator gate on the third floor?" The court refused to submit this question and such refusal is assigned as error. The assignment is not well taken. The pleadings presented no such specific issue. The court in charging the jury under the question dealing with the alleged contributory negligence of the plaintiff said:

"If the plaintiff was warned against raising the gate in getting off the car, either by posted sign or by word of mouth, and, contrary to such warning, raised the gate, and such act contributed proximately to produce his injury, then such act constituted want of ordinary care on his part that contributed proximately to his injury. The effect, in this respect, of the sign 'Do not raise the gate' on the gate, or other gates, facing outwards, if you find such a sign was up at the time of or prior to the injury, is for you to determine. If you find that the natural and reasonable effect of such sign, if you find it had been posted, was to warn against raising the gate in getting off the elevator, then the plaintiff must be held to have had knowledge of the danger to him of such act, and to have been guilty of contributory negligence if he raised the gate and such act contributed proximately to produce his injury."

No particular fault is found with the accuracy of this instruction, and it informed the jury that if the notice not to raise the gates had been given, and failure to obey such notice was the proximate cause of the injury, then it must find plaintiff guilty of contributory negligence. Inasmuch as the proposed question did not cover a fact specifically pleaded, the instruction quoted was a sufficient substitute therefor. The situation is like that presented in *Steber v. C. & N. W. R. Co.* 139 Wis. 10, 120 N. W. 502, where it was held not to be error to refuse to submit a specific question because of the character of the charge upon the general question dealing with the subject of contributory negligence. What is here said is

in harmony with *Wawrzyniakowski v. Hoffman & B. Mfg. Co.* 146 Wis. 153, 131 N. W. 429, where the cases bearing on the subject under consideration are reviewed.

The defendant requested the court to charge the jury as follows:

"In judging of the credibility of the plaintiff's evidence, you may properly consider the interest plaintiff has in the result of his trial, the temptation to which he is subjected, under the circumstances, to color his testimony favorably to himself, and you will consider everything bearing on that subject, and give to the evidence of the plaintiff such weight only as, in your judgment, it is entitled to, and a like test should be applied to the evidence of each of the witnesses who has testified in this case."

The instruction was correct and should have been given. This court has decided, in *Kavanaugh v. Wausau,* 120 Wis. 611, 98 N. W. 550, that it is reversible error not to give such an instruction, and the *Kavanaugh Case* is expressly approved in *Blankavag v. Badger B. & L. Co.* 136 Wis. 380, 117 N. W. 852. The equivalent of this instruction was not given, as respondent's counsel contend. The court did say:

"You are the sole judges of the credibility of each and every witness sworn upon the trial, as well as of the weight and effect of the evidence as a whole. In determining the credibility you should consider the witness's apparent intelligence, candor, knowledge of the matters testified about, interest in the result of the trial, relationship to or relations with the interested parties, corroboration by other credible evidence or proved facts or circumstances, the motives for falsifying, or the absence of these things, or any of them, so far as their presence or absence appears from the trial, the manner and appearance of the witnesses upon the stand, the inherent reasonableness or the absence of it of the statements made, and any other facts or circumstances appearing from the evidence or upon the trial tending to affect the question."

This instruction does not call the immediate attention of the jury to the fact that the plaintiff had a strong motive for

testifying to such facts as he thought might assist him in securing a verdict. Without his own testimony plaintiff could not have recovered, and his evidence on some material matters was contradicted by a number of apparently disinterested witnesses. So no good reason is apparent why the court should have refused to give the instruction to the jury for its guidance. However, since the passage of sec. 3072*m*, Stats. (Laws of 1909, ch. 192), this court has said that the refusal to give this instruction is not prejudicial error, and it has so said in a case where the refusal to give it was at least as likely to result injuriously to the defendant as would the refusal in this case, and in fact more so, because there the more general instruction was not given. *Szewczyk v. E. W. Ellis L. Co.* 146 Wis. 452, 131 N. W. 977. Under the authority of that case we must hold that the refusal of the court to give the instruction was not reversible error.

It is insisted by the appellant that the damages assessed, amounting to $3,600, are excessive. There is some evidence of permanent injury, and there is no doubt that plaintiff was very severely hurt by his fall of thirty-eight feet down the elevator shaft and that he suffered a great deal of pain in consequence of such fall. The award of damages is very liberal, but is not so excessive that this court should interfere with it.

A number of other errors are assigned, relating principally to rulings on evidence and to alleged errors in the charge. We do not think the appellant is entitled to a reversal because of them or that any useful purpose would be served by discussing them in detail. We find no reversible error in the record.

By the Court.—Judgment affirmed.

In support of a motion for a rehearing there was a brief for the appellant by *Doe & Ballhorn.*

For the respondent, *contra,* there was a brief by *Charles E. Hammersley* and *Christian Doerfler.*

The motion was denied March 12, 1912.

PABST BREWING COMPANY, Respondent, vs. CITY OF MILWAUKEE, Appellant.

JOSEPH SCHLITZ BREWING COMPANY, Respondent, vs. CITY OF MILWAUKEE, Appellant.

December 7, 1911—March 12, 1912.

(1) *Pleading: Liberal construction.* (2–10) *Municipal corporations: Milwaukee city charter: Viaducts: Changing grade of streets: Injury to abutting property: Liability: Assessment of benefits and damages: Questions for jury: Appeal: Record: Presumptions: Harmless errors.*

1. Upon a demurrer *ore tenus* a complaint will be liberally construed and all reasonable presumptions allowed in its favor.
2. The provision in the Milwaukee city charter that no lotowner who shall have signed a petition for a change of the street grade or for the grading of the street in conformity with such altered grade shall be entitled to compensation, etc., does not constitute an *exception* to the statutory right to recover for damage caused by such a change, but rather a condition which goes to defeat it, and hence is matter of defense.
3. An "exception" exempts something absolutely from the operation of a statute by express words in the enacting clause, while a "proviso" defeats its operation conditionally.
4. Under ch. 376, Laws of 1901, providing for the construction of viaducts, the damages to abutting lotowners on a street upon which such a viaduct is built are to be ascertained in the same manner as in cases of alteration of street grades, and a contrary intent is not evinced by the provision in sec. 2 of that act, that "as soon as practicable" after plans, specifications, and an estimate of cost have been made, "the city may enter upon the construction" of the viaduct. An estimate of benefits and damages must therefore be had before the city proceeds with the construction.
5. Where the city omits to take the necessary steps for the assessment of benefits and damages before proceeding with the work, an abutting lotowner whose property is damaged by the construction of the viaduct may maintain an action against the city to recover such damages.
6. The construction of a viaduct in a street graded to an established grade is an alteration of such grade which, under the charter of Milwaukee, entitles abutting owners to recover the actual damages sustained by reason thereof.

7. It being admitted that prior to the paving of a street (on which a viaduct was afterward constructed) the city had by ordinance established the grade thereof, proof that the common council ordered said street to be paved with granite blocks, but on petition of the property owners permitted them to pave it with cedar blocks; that street levels of the established grades were furnished by the city engineer; that the work was done conformably to such levels, and when completed was approved by the department of public works; and that the common council allowed and ordered paid to such owners the cost of paving the street intersections,—is *held* to justify the ruling of the trial court that as a matter of law the street when paved was graded to the established grade.
8. In such case, the original bed of the street having been of a low and swampy nature, the fact that after fourteen years use a new survey showed the actual grade to vary from the established grade at the time of paving, did not raise such a conflict as to require submission of the evidence to the jury.
9. In the absence from the record of the instructions upon the subject of damages, this court must assume on appeal that the jury was properly limited to the actual depreciation in the market value of plaintiff's property, and cannot say that evidence admitted over objection as to the original cost of the buildings and land, as to the effect of the viaduct and its use upon the light and dampness of plaintiff's property, and as to the effect of the noise and vibration upon the property itself and its occupancy, was prejudicial to the defendant.
10. The city in constructing a viaduct having acted in disregard of the statute and being therefore a trespasser upon plaintiff's property rights, is liable for injury to the foundation and walls of plaintiff's building caused by vibrations from the driving of piles for the foundations of the viaduct piers, that being a proximate result of the construction of the viaduct and attributable to the city's wrongful act.

APPEALS from judgments of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

These cases are both against the city of *Milwaukee* for damages for injuries alleged to have been caused to the plaintiffs' properties by the erection of the Sixth street and First avenue viaduct, which crosses the Menomonee valley and connects the west and south sides of the city of *Milwaukee.* The roadway of the viaduct is about twenty-four feet above the surface of

First avenue, on which the properties of the plaintiffs abut, and from which there was access at grade to the buildings erected upon these premises. The viaduct has been erected under the authority conferred by ch. 376, Laws of 1901.

In the spring of 1888 the city established a grade upon this street for paving it with granite blocks. Resolutions were passed by the common council and other proceedings had for grading, curbing, laying drains and gas and water pipes, and providing for paving the street with granite blocks. In the fall of the year a resolution was adopted by the common council rescinding the resolution of August 13, 1888, which provided for paving the street with granite blocks, and instructed the board of public works to grade and otherwise improve the street. Subsequently the street was paved with cedar blocks by the property owners, the city paying the cost of the paving of the street intersections and of the gutters. This was done upon the recommendation of the officers in charge of the work and upon bills presented therefor and approved by the common council.

The city engineer, who at the time the street was paved in 1888 was assistant engineer for the city and in charge of work in this section of the city, testified that the paving was done at the grade established by the common council. There was also some evidence that the work in 1888 was done under the supervision of a superintendent for the city. There was evidence from surveys made in 1902 to the effect that at that time the paving was not on the grade established before the improvement of 1888 was made. There was also evidence that the ground in the valley was low and soft and that there had been some settling.

Evidence was received of the original cost of the buildings and of the real estate; of the effect on the buildings, as to light and dampness, of the erection of the viaduct; of the effect on the neighboring ground of the pile-driving for the viaduct; of the effect of the noise, dust, and dirt and the

jarring caused by passing wagons and cars on the buildings; of the nonaccessability of the buildings from the viaduct; and of losses of rent.

There was no assessment of benefits and damages due to the erection of the viaduct.

The court overruled demurrers *ore tenus* in both cases, refused to grant nonsuits, held as matter of law that the evidence established plaintiffs' right to damages, and submitted to the juries only the question of damages.

In the case of *Joseph Schlitz Brewing Company v. City of Milwaukee* the jury separately found an item of $455.75 as the damages caused to the structures on the premises during the construction of the viaduct. These damages were additional to the depreciation in the market value of the premises otherwise caused by the change of grade.

These are appeals from the judgments awarding damages on the verdicts.

For the appellant, *City of Milwaukee,* there were briefs by *Daniel W. Hoan,* city attorney, and *Clifton Williams,* special assistant city attorney, and oral argument by *Mr. Williams.*

For the respondent *Pabst Brewing Company* there was a brief by *Quarles, Spence & Quarles,* and oral argument by *W. C. Quarles.*

For the respondent *Joseph Schlitz Brewing Company* there was a brief by *Doerfler, Green & Bender,* and oral argument by *W. H. Bender.*

The following opinion was filed January 9, 1912:

SIEBECKER, J. The complaints were challenged by the defendant when evidence was offered by demurrers *ore tenus,* upon the ground that the facts alleged constituted no cause of action for the recovery of damages by the plaintiffs by reason of the erection of the viaduct in front of the plaintiffs' premises abutting on First avenue. When such objection is made to a complaint it will be liberally construed and all rea-

sonable presumption to accomplish justice will be allowed in its favor. Before the trials and before evidence was received, amendments were properly allowed pertaining to the establishment of street grades after February 20, 1852, and to the default of the city in omitting to make any assessment of benefits and damages as to the plaintiffs' properties by the alleged change of grade. After such amendments the complaints were sufficient to show that an assessment of benefits and damages, as provided by the city charter, had not been made by the city either before or after the construction of this viaduct.

If the charter provisions respecting alteration of grades of streets are applicable to these cases, it further appears that the complaints omitted to allege that the plaintiffs did not sign the petition asking for the alteration of the grade of the street. In sec. 8 of ch. VII of the city charter it is provided "that no owner of any lot, . . . who shall . . . have signed a petition asking for such alteration of grade, or a petition asking for the grading of a street in conformity with such altered grade, shall be entitled to compensation, but every such owner shall be deemed to have waived and relinquished all claim to compensation for any injury in consequence thereof; and no damages, costs or charges arising to such owner from such alteration of grade, shall be assessed or paid to such owner." It is contended that this provision of the charter is an exception to the statutory right granting the abutting lotowner the right to recover the damages caused by an alteration of established street grades and hence must be negatived in the complaint, because it is an allegation which is essential to support the cause of action. However, this provision of the charter, in its nature, is not an exception to the right granted, but is a condition which goes to defeat it and hence is matter of defense. It defeats the operation of the parts of the charter which grant the right to damages and goes in avoidance of the right instead of excepting it therefrom. The distinction be-

tween an exception and a proviso in a statute is clearly stated in *Rowell v. Janvrin,* 151 N. Y. 60, 45 N. E. 398, as follows:

"An exception exempts something absolutely from the operation of a statute by express words in the enacting clause; a proviso defeats its operation conditionally. An exception takes out of the statute something that otherwise would be part of the subject matter of it; a proviso avoids them by way of defeasance or excuse."

We consider that the provision relied on does not embody an exception to the right granted, and hence to state their cause of action the plaintiffs were not required to negative it. *Splinter v. State,* 140 Wis. 567, 123 N. W. 97; *Rowell v. Janvrin, supra;* 31 Cyc. 115.

It is also claimed that the alleged causes of action do not constitute a ground for a claim for damages because ch. 376, Laws of 1901, makes full provision for the construction of viaducts over railroad tracks and for crossing public streets in cities of the first class, regulates the proceedings, and provides for ascertaining the damages caused thereby and the manner in which funds to defray all costs, damages, and expenses shall be raised; and hence that the charter provisions prescribing what steps shall be taken in making an alteration of the grade of streets and assessing the benefits and damages, in the manner therein prescribed, have no application here and need not be followed. Sec. 2 of ch. 376, Laws of 1901, enacts:

"Whenever the common council of such city shall have determined to erect and construct such a viaduct it shall cause to be made a complete profile plan and detailed specifications for the work, with an estimate of the cost thereof, and as soon thereafter as practicable the city may enter upon the construction of said viaduct, . . . and all provisions of law relative to public work or improvements in said city, which are not inconsistent with the provisions of this act shall apply to the work hereby authorized, and all official acts incidental thereto. If by the construction of such viaduct . . . any damages shall be sustained by the owners of abutting prop-

erty, to the property owned by them, such damage shall be ascertained and determined in the manner provided by law for the determination and assessment of damages for the alteration of the grade of a street in said city and shall be paid as hereinafter provided."

We find nothing in the context of this provision expressly to the effect that the damages caused to abutting lotowners by the construction of a viaduct shall not be ascertained as prescribed in cases of alteration of street grades. It is argued that the language of this section, "and as soon . . . as practicable," after plans, specifications, and an estimate of the cost have been made, "the city may enter upon the construction of said viaduct," evinces an intent that the construction of the viaduct is to proceed without an assessment of benefits and damages, as is provided in other cases of alteration of street grades, and hence that the charter provisions respecting the assessment of benefits and damages do not apply. The phraseology employed cannot be said reasonably to imply such an intent. Sec. 5 of ch. 376 provides that funds for the construction of a viaduct, including payment of damages to abutting owners, shall be provided by a bond issue. There is nothing therein to indicate that the city is not required to follow the usual course for ascertaining the amount of the costs and the damages of a city improvement before undertaking the construction, and to provide the necessary funds therefor. The context of the law contains no express provisions on the subject, nor does it necessarily imply that the charter provisions for assessment of benefits and damages are inapplicable to this viaduct statute. Hence, they must be held to apply in the instant cases as to an alteration of an established street grade. There is no dispute but that the city omitted to take the steps prescribed for the assessment of the benefits and damages resulting to the plaintiffs from the construction of this viaduct; hence they are entitled to maintain these actions to compensate them for the damages caused to their properties by this change of grade.

The plaintiffs planted their complaints upon the ground that the construction of this viaduct constituted a change of the grade of a street. The case of *Colclough v. Milwaukee,* 98 Wis. 182, 65 N. W. 1039, held that the erection of a viaduct in a street graded to an established grade was an alteration of such grade and entitled the abutting owners to the actual damages they sustained therefrom. It is claimed that the evidence fails to show in each of these cases that First avenue had been graded to conform to an established grade prior to the construction of this viaduct. It is admitted that prior to the grading and paving of First avenue with cedar blocks by the lotowners under the supervision of the city authorities in 1888, the city had by ordinance established the grade of this street. It was held as matter of law, under the evidence adduced, that before the construction of this viaduct this street had been graded to an established grade. The defendant asserts that this ruling of the trial court is not sustained by the record. It appears as undisputed under the evidence that the common council in 1888 directed that First avenue be paved with granite blocks and that upon the request of the abutting property owners it rescinded such action to permit such owners to pave it with cedar blocks; that the abutting owners undertook and made this improvement under the authority of the board of public works and under the direction of the civil engineering department of the city; that street levels for grading and paving the street were furnished the owners by the engineer in charge thereof; that the owners graded and paved the street as directed and conformably to the levels so furnished, and that when completed the work was approved by the department of public works upon the report of the assistant city engineer. Upon a report to the common council of the satisfactory completion of the improvement by the abutting owners the common council allowed and ordered payment to such owners of the bills for paving the crossings and the construction of the gutters, and such

bills were thereafter duly paid. The assistant engineer's evidence, to the effect that the levels furnished for making such improvements were of the established grades, is without dispute. These positive facts and the facts and circumstances showing the course of dealing between the city and the lotowners in the making of this improvement furnish ample ground to sustain the conclusion that when the street was paved in 1888 it was graded to conform to an established grade. In the light of the use of the street during the intervening years and the fact that the original bed thereof was of a low and swampy nature, liable to allow the surface to become uneven and depressed below the level of the original grade, the fact that the actual grade of the street in 1902 varied from the established grade at the time of construction does not raise such a conflict as to require submission of the evidence to the juries.

Evidence of the value of the premises before and after the construction of the viaduct was received, and in connection therewith evidence was admitted over objection of the original cost of the buildings and real estate, of the effect of the viaduct structure and its use by the public upon the light and dampness of the plaintiffs' properties, and of the noise and vibration arising from the viaduct as affecting plaintiffs' properties and their occupancy. An exception is urged to the latter class of evidence on the ground that it was immaterial to the question of depreciation of the properties and allowed the juries to include elements of injury to property not contemplated in the law. The instructions on the subject of damages are not before us. We must assume that the juries were properly limited in fixing the amounts of the damages to the properties to the depreciation in the fair market value thereof after the change of grade resulting from the construction of this viaduct, and hence cannot say that the admission of the evidence excepted to operated to the prejudice of the defendant.

It is claimed that the item of $455.75, separately found

in the *Schlitz Case* as special damages resulting to the structures on the premises in the course of the construction of the viaduct, cannot stand. It appears in evidence that the foundations and walls of the structures on these premises were injured during the construction of the viaduct by the vibrations caused by the driving of piles for the foundation of the viaduct piers. This process of construction appears to have been appropriate for the proper construction of the viaduct, and the injury to the plaintiff's premises which resulted therefrom is such as plaintiff suffered by reason of defendant's erection of the structure. We need not determine whether such damages are contemplated as included within the damages to be awarded to abutting property owners under the provisions of ch. 376, Laws of 1901, since the plaintiff had the right to hold defendant as a trespasser upon its rights in proceeding to erect the viaduct in disregard of the provisions of the statute which conferred the right on the city. Under these circumstances the city is liable in tort for the damages caused by the wrongful invasion of the plaintiff's property rights. *Filer & S. Co. v. Milwaukee,* 146 Wis. 221, 131 N. W. 345; *Waukesha v. Randles,* 120 Wis. 470, 98 N. W. 237. Under the evidence it is shown that this item of damages was the proximate result of the construction of the viaduct and hence attributable to the defendant's wrongful conduct. Plaintiff was properly awarded recovery therefor.

We find no reversible error in the records of these cases.

By the Court.—The judgments are affirmed.

A motion for a rehearing was denied March 12, 1912.

ZOHRLAUT, Respondent, vs. MENGELBERG, Appellant.

December 8, 1911—March 12, 1912.

Affirmance on equal division of court.

APPEAL from orders of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Flanders, Bottum, Fawsett & Bottum,* and oral argument by *J. G. Flanders* and *C. F. Fawsett.*

For the respondent there was a brief by *Lines, Spooner, Ellis & Quarles* and *Glicksman, Gold & Corrigan,* and oral argument by *Geo. Lines* and *W. L. Gold.*

The following opinion was filed January 9, 1912:

KERWIN, J. This is an appeal from two orders of the circuit court for Milwaukee county, one overruling a demurrer to the respondent's complaint, and the other granting the motion of respondent for an injunctional order restraining appellant from taking any steps to collect the judgment referred to in the complaint until the determination of the action.

Justice TIMLIN having been of counsel in the case did not sit. The other members of the court are equally divided. Chief Justice WINSLOW, Justices BARNES and VINJE are in favor of reversal, while Justices SIEBECKER, MARSHALL, and the writer are in favor of affirmance. This situation necessarily results in affirmance of the orders appealed from.

By the Court.—The orders appealed from are affirmed.

A motion for a rehearing was denied March 12, 1912.

REISMIER, Plaintiff in error, vs. THE STATE, Defendant in error.

February 2—March 12, 1912.

Intoxicating liquors: Unlawful sale: To whom statute applies: License: Evidence: Sale by third person: Agency: Instructions to jury: Harmless errors.

1. Whether sec. 1564, Stats. (1898), prohibiting the sale of liquor on certain days by "any tavern keeper or other person," applies only to persons duly licensed to sell liquors, not determined.
2. In a prosecution for violation of said statute, where there is proof that defendant was a tavern keeper, it will be presumed, in the absence of evidence to the contrary, that he was a licensed tavern keeper, rather than that he was engaged in an unlawful business; hence in such a case the admission of parol evidence on the part of the state to show that defendant was licensed was not a prejudicial error.
3. Rejection of evidence as to the mental capacity of the person who actually sold the liquor was not a prejudicial error where the evidence as to whether or not he was authorized by defendant to act as his bartender and was temporarily in charge of the bar was admitted.
4. Where in the general charge the jury were fully instructed that before they could convict they must find defendant guilty beyond a reasonable doubt and must find that the sale was made by him either in person or by his agent, it was not error to refuse a requested instruction to the effect that defendant would not be responsible for a sale by a mere interloper who was not his agent.
5. An instruction to the effect that if the liquor was sold illegally by his bartender or agent defendant would be guilty the same as though he had performed the illegal act himself, because "the law makes him responsible for the legal operation and running of his saloon or bar," was correct and not misleading.
6. An instruction to the effect that sale by an interloper is an affirmative defense, and the defense should show that the seller was an interloper and not a representative of the defendant, is construed to mean that defendant might raise a reasonable doubt by such showing.
7. Where the sale in question was actually made by one T., the ruling out of a question to defendant, "Did you ever trust the business to T.?" was not prejudicial error, where other more pertinent questions covering the subject of T.'s authority were asked and the answers admitted.

ERROR to review a judgment of the municipal court for the Eastern district of Waukesha county: CHARLES E. ARMIN, Judge. *Affirmed.*

For the plaintiff in error the cause was submitted on the brief of *Tullar & Lockney.* To the point that it was necessary for the state to prove that defendant was a licensed saloon keeper, they cited *Jensen v. State,* 60 Wis. 577, 19 N. W. 374; *Brubaker v. State,* 89 Ind. 577; *State v. Wade,* 63 Vt. 80, 22 Atl. 12; *Peterson v. State,* 63 Neb. 251, 90 N. W. 964; *Bloomington v. Strehle,* 47 Ill. 72; *State v. Nethken,* 60 W. Va. 673, 55 S. E. 742.

For the defendant in error the cause was submitted on the brief of *Milo Muckleston,* district attorney.

KERWIN, J. Plaintiff in error, hereinafter called defendant, was prosecuted under sec. 1564, Stats. (1898), for unlawfully selling intoxicating liquor on the 5th day of April, 1910, being the day of the annual town meeting. The jury returned a verdict of guilty, and the court sentenced the defendant to pay a fine of $5 and costs, or in default of payment be imprisoned in the county jail for a period of ten days. The defendant appealed from the judgment of conviction.

Sec. 1564 reads as follows:

"If any tavern keeper or other person shall sell, give away or barter any intoxicating liquors on the first day of the week, commonly called Sunday, or on the day of the annual town meeting or the biennial fall election, such tavern keeper or other person so offending shall be punished by a fine of not less than five nor more than twenty-five dollars or by imprisonment in the county jail not to exceed thirty days, or by both such fine and imprisonment."

Several errors are assigned, which will be treated in their order.

1. It is claimed that the court erred in permitting the state to prove by parol evidence that the place of business of the

defendant was a licensed saloon, relying upon *Hepler v. State*, 58 Wis. 46, 16 N. W. 42; *Jensen v. State*, 60 Wis. 577, 19 N. W. 374, and some cases in other jurisdictions.

It will be seen that the statute upon which this prosecution is based prohibits the sale of intoxicating liquors on Sunday and election day by any "tavern keeper or other person," and does not, at least directly, involve the question of selling without a license. The case of *Hepler v. State, supra,* was a prosecution for selling intoxicating liquors without a license. In *Jensen v. State, supra,* this court construed sec. 1564 as to meaning of "tavern keeper or other person" and held that "tavern keeper," within the meaning of the act, is a person whose business, in part at least, is to sell liquors, and the words "other person" must refer to a similar class of persons and include those engaged in the business of selling liquors. And it was further held that it was not necessary to determine whether the statute under consideration should be restricted to persons licensed to sell intoxicating liquors. So it will be seen that these cases do not hold that it is necessary, in a prosecution under this statute, to prove that the tavern keeper or other person was duly licensed to sell intoxicating liquors. It was only necessary to prove in the instant case that the defendant was a tavern keeper or a person engaged in the business of selling liquor. *State v. Grant,* 20 S. Dak. 164, 105 N. W. 97; 6 Current Law, 184, 185, and cases cited. A conviction for violation of liquor laws may be supported by circumstantial evidence alone. 23 Cyc. 249. It may be shown that the premises in question were fitted up as a bar room, or contained the paraphernalia or implements of liquor selling, such as a bar, beer pump, whisky glasses, and the like. 23 Cyc. 251. There is sufficient evidence in this case to warrant the jury in finding that the defendant was at the time of the alleged offense a tavern keeper, and it must be presumed that he was a licensed tavern keeper, in the absence of any evidence to the contrary, rather than engaged in an unlawful

business. We need not and do not decide whether the statute under consideration applies only to licensed persons.

2. Error is assigned in the rejection of evidence offered by defendant to prove the mental condition of one Tony Schimek. It appears from the evidence that Tony was the brother-in-law of defendant and that he sold one glass of beer on the day in question. The contention of the defendant is that he was not authorized to sell, and that he was weak-minded, and the error complained of is in sustaining an objection to the question, "What is his mental condition?" This question was objected to and the objection sustained on the ground of immateriality. Counsel then asked defendant: "*Q.* Is Tony Schimek, or was he on the 5th day of April, or at any time, authorized or directed by you to have anything to do with the saloon there? *A.* No, sir. *Q.* And is there an understanding between you and Mr. Schimek on that point? *A.* Yes, sir." Mr. Schimek referred to was the bartender. There was a motion to strike this evidence out, but the court permitted it to stand. It seems there was no prejudicial error in ruling out the question as to the mental condition of Tony. He might be of rather weak mental condition, yet have sufficient mentality to perform the simple function of dealing out a glass of beer and receiving the nickel. The important inquiry was as to whether he was authorized, and this evidence was let in, although the court intimated that he did not regard it material. There was evidence in the case that the bartender, Mr. Schimek, who is the father of Tony, also sold beer shortly before the sale by Tony. So it appears that the bar was open and drinks were being sold aside from the beer sold by Tony. Tony was behind the bar when he sold the beer, apparently at least in the discharge of his duties. If he had authority to act for the defendant as bartender and was temporarily in charge of the bar, the defendant would be liable for his acts even though he sold the beer without defendant's consent or

even against his instructions. *State ex rel. Conlin v. Wausau,* 137 Wis. 311, 118 N. W. 810; *Olson v. State,* 143 Wis. 413, 127 N. W. 975. So the material question in the case is whether Tony was authorized to act for the defendant in the capacity of bartender, not what was his mental condition. There is evidence that on the day in question the defendant's regular bartender was behind the bar and sold at least one drink.

3. Error is assigned on the refusal of the court to charge as follows:

"In this action, before you can convict the defendant of the charge set forth in the complaint, it is incumbent upon the state to establish beyond a reasonable doubt that intoxicating liquors or drinks were sold by the defendant or his agent."

"In other words, if any intoxicating liquors or drinks were sold or given away by a mere interloper, in the absence of the defendant and his agent from the place, I charge you as a matter of law that the defendant would not be liable and could not be convicted under that evidence."

"The state must show beyond a reasonable doubt that the boy Tony was the agent of the defendant, *Reismier,* and authorized by him to sell liquor or to conduct the business of the saloon."

"While the defendant is legally responsible for the act of his agents in the conduct of the saloon, the state must prove beyond a reasonable doubt that any person selling was the agent of the defendant."

We cannot think that there was any prejudicial error in the refusal to give the foregoing requests. The court did charge fully upon the question of reasonable doubt, and told the jury the defendant came into court presumed to be innocent and that they must find him guilty beyond a reasonable doubt before they could convict; and further, on the question of sale, charged:

"The real question for you to determine in this case is whether, on the 5th day of April, 1910, the defendant, being

then and there engaged in the business of selling liquors, or that being a part of his business, did sell or give away intoxicating liquors to any person on that day, either in person or by an agent."

This charge seems clearly to have covered the point that the defendant would not be liable for a sale by a mere interloper, who was not defendant's agent, and also covered the point that the sale must be by the defendant in person or by his agent. We think so far as the requests were proper they were covered by the general charge.

As before observed, this court has laid down a very strict rule against persons dealing in intoxicating liquors and making them liable for the acts of those in charge of the saloon. *State ex rel. Conlin v. Wausau,* 137 Wis. 311, 118 N. W. 810; *Olson v. State,* 143 Wis. 413, 127 N. W. 975.

4. Exception is also taken to the following portion of the charge:

"It has recently been held by our supreme court, as this court understands the ruling, that if it appear that the liquor or drink was sold by a bartender or agent or representative of the defendant and was sold contrary to law that the defendant would be guilty the same as though he had performed the illegal act himself, for the law makes him responsible for the legal operation and running of his saloon or bar."

The court, in speaking of the recent decision of this court as to the guilt of the defendant where the act was performed by his bartender or agent, stated that the saloon keeper was guilty the same as though he had performed the illegal act himself, and further said, which is separately excepted to, "for the law makes him responsible for the legal operation and running of his saloon or bar." We cannot see that the jury could have been misled by this instruction. It clearly had reference to the rule under our recent decision of liability of saloon keepers for the acts of their agents though per-

formed contrary to instructions. The jury returned for further instructions, and exception is taken to the following:

"I will say to the jury that, as the court views the law, the person who takes out a license to run a saloon assumes all responsibility for having it run according to law; that if any one who is found acting contrary to law is not their representative, the court views it that that is an affirmative defense; that the defense should make—should show that the person was an interloper and not a representative of the owner of the place."

This instruction was given on the question whether Tony was authorized to make the sale or was a mere interloper and must be construed to mean that the defendant might raise a reasonable doubt by such showing. We see no objection to this part of the charge. Tony was behind the bar when he made the sale and received a nickel for the glass of beer sold; no one else, apparently, was in charge of the saloon; and in the absence of any evidence to the contrary the jury would have the right to infer from the whole record that he was authorized to act for the defendant in that capacity. Complaint, however, is made by counsel for defendant on this point that the court refused to permit defendant to show that Tony was not authorized to represent the defendant. But the principal error complained of on this point is the exclusion of evidence to the effect that Tony was not in his right mind. True, the question was asked and ruled out, "Did you ever trust the business to Tony?" But just before this question was put and ruled out the bartender was permitted to answer that Tony had nothing to do with the saloon. The latter question was quite broad and might well be understood by the jury to have reference to the business generally, and not to a single sale or sales with the bartender's consent while he was temporarily absent.

Moreover, more pertinent questions were asked and permitted to be answered covering the subject.

Error is assigned on the refusal of new trial. This motion is based upon the errors heretofore considered.

We cannot say that the defendant was prejudiced by any of the alleged errors complained of. Therefore the judgment must be affirmed.

By the Court.—The judgment of the court below is affirmed.

SIOUX LAND COMPANY, Respondent, vs. EWING and others, imp., Appellants.

February 20—March 12, 1912.

Evidence: Depositions to perpetuate testimony: Special proceeding: Appealable orders.

1. An application under secs. 4117–4134, Stats. (1898), to perpetuate testimony, where no action is pending, is a special proceeding.
2. An order appointing a commissioner to take depositions to perpetuate testimony under secs. 4117–4134, Stats. (1898), is not a final order nor one affecting a substantial right, and is therefore not appealable. The order directing the deposition to be recorded is the final order in such proceeding.

APPEAL from an order of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Dismissed.*

Pursuant to the provisions of secs. 4117–4134, Stats. (1898), the *Sioux Land Company* made application to the circuit court for Douglas county for the appointment of a commissioner to take depositions to perpetuate the testimony of certain persons named in the petition, relative to the title of lands in which petitioner claimed an interest, so that the same might be used as evidence against all persons, under the provisions of secs. 4130–4134, Stats. (1898). The court granted the application, appointed a commissioner to take depositions, and refused, in part, to stay proceedings pending

an appeal. Appellants, who claimed title to the land in question, appeared in the court below, objected to the taking of depositions, and appealed from the order appointing a commissioner.

For the appellants there was a brief by *Catlin, Butler & Lyons* and *S. R. Alden,* and oral argument by *Mr. Alden.*

For the respondent there was a brief by *Grace, Hudnall & Fridley,* and oral argument by *Geo. B. Hudnall.*

VINJE, J. Is the order appealable? If it is, it must be because it is "a final order affecting a substantial right made in special proceedings," under subd. 2, sec. 3069, Stats. (1898). In the instant case no action is pending, so the proceeding cannot be regarded as a provisional remedy under subd. 3 of sec. 3069, for a provisional remedy must always be in, or connected with, an action. *Noonan v. Orton,* 28 Wis. 386; *Ellinger v. Equitable L. Assur. Soc.* 125 Wis. 643, 648, 104 N. W. 811; *State v. Wis. Tel. Co.* 134 Wis. 335, 113 N. W. 944; *Snavely v. Abbott B. Co.* 36 Kan. 106, 12 Pac. 522; 6 Words & Phrases, 5752; 32 Cyc. 742. Clearly, the application under the statute to perpetuate testimony, where no action is pending, is a special proceeding. Sec. 2596, Stats. (1898). That being so, is the order appealed from a final order in such proceeding and does it affect a substantial right? In our judgment, it is neither final nor does it affect a substantial right. It is not final, because sec. 4133, Stats. (1898), provides that before the deposition shall be ordered recorded the court must find that it was taken according to law and the directions contained in the commission. Such finding involves the exercise of a judicial act, an application of rules of law and the requirements of the commission to the deposition when returned. If it be found not to be taken conformably thereto, it cannot be ordered recorded, and if not recorded it cannot be used, since sec. 4134 provides that only depositions taken and *recorded* under the

statute may be used. So until an order is made by the court directing the deposition to be recorded judicial action has not terminated. The order allowing the deposition to be taken is merely an intermediate order; the order directing to be recorded is the final one. No appeal lies except from the final order. *Jarvis v. Hamilton,* 37 Wis. 87; *In re Schumaker,* 90 Wis. 488, 63 N. W. 1050; *In re Minn. & Wis. R. Co.* 103 Wis. 191, 78 N. W. 753; *Maynard v. Greenfield,* 103 Wis. 670, 79 N. W. 407; *Kingston v. Kingston,* 124 Wis. 263, 102 N. W. 577; *In re Horicon D. Dist.* 129 Wis. 42, 108 N. W. 198. In *Kingston v. Kingston, supra,* the court said: "A final order in a special proceeding, within the meaning of the statute, is one which determines and disposes finally of the proceeding—one which, so long as it stands, precludes any further steps therein." Nor does an order appointing a commissioner to take depositions to perpetuate testimony affect a substantial right. The depositions taken are innocuous till ordered to be, and in fact are, recorded. The judicial act that gives them power to affect a substantial right is the order directing them to be recorded. Until that order is made the depositions are useless, they can harm no one, for they cannot even be recorded without an order of the court, much less used.

So we conclude that the order appealed from is neither a final order in a special proceeding nor one affecting a substantial right, and for that reason the appeal must be dismissed; for if the order is not appealable this court acquires no jurisdiction to consider the merits. *Hyde v. German Nat. Bank,* 96 Wis. 406, 71 N. W. 659; *In re Minn. & Wis. R. Co.* 103 Wis. 191, 78 N. W. 753.

By the Court.—Appeal dismissed.

TOWN OF STINNETT, Appellant, vs. NOGGLE, Respondent.

February 20—March 12, 1912.

Towns: Treasurer: Default in turning over funds to successor: Right of action: Demand: Pleading: Sufficiency: Counterclaim: When must exist at commencement of action.

1. Under subd. 6, sec. 836, Stats. (1898), and sec. 819, Stats. (Laws of 1907, ch. 55), a town treasurer is not in default, and the town board has no right to bring an action against him, by reason of his not turning over funds of the town to his successor, until after a demand has been made therefor.
2. In an action by a town against its former treasurer a complaint alleging that defendant had unlawfully retained and converted to his own use moneys belonging to the town and had refused to turn over the same to plaintiff, is *held* sufficient to show that there had been a demand.
3. An allegation in such complaint that defendant had acted as treasurer until a certain date, "when his successor was appointed and qualified, and one T. was the said person so appointed," is *held* sufficiently to allege that a successor to defendant as treasurer had been appointed and had qualified.
4. In an action by a town against its former treasurer for moneys alleged to be withheld by him, a counterclaim to the effect that defendant had paid out on behalf of the town a sum in excess of the total amount received by him, states a cause of action arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim and is connected with the subject of the action, within subd. 1, sec. 2656, Stats. (1898).
5. Whether the cause of action pleaded as a counterclaim under subd. 1, sec. 2656, Stats. (1898), must have existed at the time of the commencement of the action, not determined. *Orton v. Noonan*, 29 Wis. 541, questioned.
6. Where at the time of the commencement of an action by a town against a former town treasurer the plaintiff was in fact indebted to the defendant, such indebtedness, if in other respects pleadable as a counterclaim under subd. 1, sec. 2656, Stats. (1898), may be so pleaded notwithstanding the provision of sec. 824 that no action can be maintained upon such a claim until after it has been laid before the town board of audit, etc., if in fact that condition precedent be fulfilled before the expiration of the time within which defendant is required to plead.

APPEAL from an order of the circuit court for Washburn county: FRANK A. ROSS, Circuit Judge. *Reversed.*

This action is brought by the plaintiff to recover $593.81 from the defendant. The complaint, among other things, alleged that at the municipal election held in said town in April, 1907, the defendant was duly elected and thereafter duly qualified as town treasurer of the plaintiff town and entered upon the duties of his office; that at the municipal election held in said town in April, 1908, said defendant was elected for the period of one year, but that he failed to qualify by giving the required bond, although he continued to act as treasurer until about the 12th day of December, 1908, when his successor was appointed and qualified, and that one Robert Trulson was the person so appointed to act as treasurer from and after the said 12th day of December; that the defendant while acting as treasurer received into his hands moneys belonging to the different school districts, for county taxes, school taxes, current expenses, highway taxes, saloon licenses, and other moneys, all belonging to said town, in the sum of $9,687.69; that defendant while acting as treasurer disbursed in behalf of said town the sum of $9,093.88, and no more; that defendant "did then and there wrongfully and unlawfully retain in his possession and convert to his own use, and without any right or authority so to do, keep and maintain of the moneys belonging to the said plaintiff, which he has ever since refused to turn over to said plaintiff, the sum of $593.81, and the said *George W. Noggle* has ever since the 12th day of December, A. D. 1908, so unlawfully retained and converted to his own use and withheld of the moneys belonging to said town, the said sum of $593.81."

To the foregoing complaint the defendant answered and thereafter served an amended answer. In each of these pleadings the defendant attempted to set up a counterclaim. The counterclaim set forth in the amended answer alleged that various sums of money had come into his hands as town

treasurer; that said sums were deposited in the First National Bank of Hayward, as directed by the town board of supervisors of said town, together with his collection fees; that during his incumbency the plaintiff town borrowed a large sum of money from the First National Bank of Hayward for the use of said town, to be deposited to the credit of defendant as town treasurer, but as to the amount of such loan or the amount placed to his credit defendant has no knowledge; that defendant paid out during the time he was so acting as town treasurer, upon orders of the chairman countersigned by the town clerk, and to school treasurers legally entitled thereto, a sum of money in excess of the amount so received and so deposited, including his fees for the collection of said moneys upon the tax roll, as treasurer, in the sum of $476.56, which sum defendant pleads as a counterclaim to plaintiff's complaint herein. The counterclaim further alleged that on the 4th day of April, 1911, defendant duly filed his claim for said sum with the town clerk, to be audited and allowed, and that the town board neglected and refused to audit the same and the same was presented to the electors of said town at the annual meeting on the 4th day of April, 1911, for allowance, and the electors of said town disallowed said claim, and that more than ten days have elapsed since the last annual town meeting and that said claim has not been paid or allowed or any part thereof, and that there is now due to defendant from said town the sum of $476.56. The action was commenced on February 23, 1911, and the original answer was served on March 16, 1911, and the amended answer was served on April 20, 1911. A demurrer was sustained to the counterclaim contained in the first answer. The plaintiff again demurred to the counterclaim set forth in the amended answer. The circuit court held that the complaint did not state facts sufficient to constitute a cause of action and sustained the demurrer as a demurrer to the complaint. From an order entered accordingly the plaintiff appeals.

For the appellant there was a brief by *J. C. Davis,* attorney, and *Sanborn, Lamoreux & Pray,* of counsel, and oral argument by *Mr. Davis.*

L. H. Mead, for the respondent.

BARNES, J. By subd. 6, sec. 836, Stats. (1898), it is provided that "It shall be the duty of the town treasurer . . . to deliver, on demand, to his successor in office, . . . all moneys in his hands as such treasurer."

By sec. 819, Stats. (1898), as amended by ch. 55, Laws of 1907, town boards "are . . . authorized to make demand for payment to the town treasurer for any damages, penalties, forfeitures or moneys due hereunder to the town; for breaches of official bonds to the damage of the town, . . . and in case of failure to comply with said demand they may bring suit to recover said . . . moneys due the town hereunder without further notice or demand whatsoever."

It is admitted that if the complaint failed to state a cause of action the demurrer to the counterclaim was properly sustained as a demurrer to the complaint. It has been held that as to actions which town boards are authorized to bring under sec. 819, Stats., no vote of the electors is necessary to authorize the commencement thereof under subd. 2, sec. 776, Stats. *Fox Lake v. Fox Lake,* 62 Wis. 486, 22 N. W. 584. And it is not claimed by the respondent that any vote of the electors was necessary. Respondent does claim, however, that the complaint is defective in that it fails to allege that a demand was made upon the defendant before suit was brought, and further, because it fails to allege that defendant's successor was duly qualified and therefore entitled to recover the money.

The action is for conversion, and there is nothing alleged to show that defendant was wrongfully in possession of the town funds until his successor was appointed and had qualified. Under the statutes referred to there was no default on

defendant's part until his successor demanded that the moneys be paid over, and no right on the part of the town board to institute an action until a demand had been made.

The complaint does not allege in specific terms that a demand was made, but we think it does so in substance and effect. Pleadings must be liberally construed. The complaint alleges that defendant unlawfully converted the money. The demurrer admits this allegation to be true, but it can only be true because a demand was in fact made, as that was one of the essential things to make a conversion. Again, the complaint alleges that the defendant refused to pay over the money sued for. This plainly implies that he had been requested to do so, because ordinarily a refusal follows a request or demand. So, while we cannot commend the pleading as a model one, we think it was broad enough to advise defendant that a demand had been made upon him and broad enough to permit evidence to be offered to that effect.

There is much less merit in the claim that the complaint does not allege that a successor to the defendant as treasurer had been appointed and had qualified. The allegation is that defendant continued to act as treasurer until December 12, 1908, "when his successor was appointed and qualified, and one Robert Trulson was the said person so appointed." It would be hypercritical to say that this averment did not advise the defendant that Trulson had been appointed to the office and had qualified himself to discharge his duties.

The sufficiency of the defendant's counterclaim has not been passed upon by the trial court, but we deem it proper to decide it inasmuch as the question has been argued. Both sides expressed great confidence in their ability to win on the facts as soon as the law of the case was settled, and are apparently anxious to go to trial on the merits. In any event, it would not be good administration of justice to invite another appeal to determine the sufficiency of the counterclaim.

Counsel for appellant contend that the defendant's alleged

cause of action did not exist until after the claim had been presented to the town board for audit and allowance and the same was laid before the electors at the annual town meeting and was disallowed, as provided by sec. 824, Stats. (1898). The claim was not disallowed by the electors until April 4, 1911. Counsel further claim that the alleged counterclaim falls within the provisions of subd. 2 of sec. 2656, Stats. (1898), and that under that subdivision only a cause of action which existed at the time of the commencement of the action, to wit, February 23, 1911, could be pleaded as a counterclaim. It is obvious that the counterclaim falls under subd. 1 of sec. 2656 instead of subd. 2. The cause of action arises out of the transaction set forth in the complaint as the foundation of plaintiff's claim and is connected with the subject of the action. As to subd. 2, the statute expressly provides that the cause of action pleaded as a counterclaim must exist at the commencement of the action. There is no such statutory requirement as to counterclaims arising under subd. 1. This court, however, held in *Orton v. Noonan,* 29 Wis. 541, that only a cause of action which existed when suit was begun could be pleaded as a counterclaim under subd. 1, because it did not clearly appear that the legislature intended to change the common-law rule in this regard. Perhaps the court in deciding this case paid too little heed to the spirit of the Code and showed too much attachment to common-law rules of procedure, and that the rule in *Orton v. Noonan* might well be abrogated. It would seem that, where the legislature has said that as to one class of causes of action they must exist when suit is commenced to be pleadable as counterclaims, and makes no such requirement as to another class, there was a reasonably plain intention to differentiate between the two. However this may be, the decision in *Orton v. Noonan* should not be extended to cases that do not fall within its limitations. There, the counterclaim interposed

was for rents which fell due after the action was begun and no part of the indebtedness had accrued at that time. Here, the alleged indebtedness existed at the time the action was begun, and the right of action was complete, except that the statute required, as a condition precedent to the commencement of a suit to enforce the existing right, that the claim must be laid before the town board for audit and allowance. Inasmuch as the indebtedness did exist when plaintiff began its action, and the condition precedent had been fulfilled within the time that defendant was required to plead, we hold that the objection raised is not tenable. While it is not the function of the courts to sweep away statutory barriers, it is their function to so construe statutes, when reasonably possible, as to require parties to try their cases on the merits and to restrict them to a minimum amount of tactical maneuvering which usually results in unnecessary delay and expense. The issues arising on the complaint in the present case necessitate an accounting to determine how much money belonging to the plaintiff came into the hands of the defendant and how much money the defendant disbursed in paying the lawful obligations of the town. When the balance is struck it will tell whether defendant owes the town or *vice versa*. If defendant has mistakenly paid out some of his own money to take care of orders drawn upon him as treasurer, common honesty and fair dealing would require that he be reimbursed, and it would be an expensive and nonsensical ceremony to require him to resort to another action to get what is found to be his due.

It follows that the order appealed from must be reversed, and the cause remanded with directions to overrule the demurrer interposed to the counterclaim. Neither party is allowed costs, except that the appellant is required to pay the clerk's fees in this court.

By the Court.—It is so ordered.

The following opinion was filed March 16, 1912:

MARSHALL, J. (*concurring*). There is little, if any, doubt here, I apprehend but that *Orton v. Noonan,* 29 Wis. 541, was wrongly decided in respect to the matter now referred to in the opinion of the court. If the result reached in this instance required it, entire re-establishment of subd. 1, sec. 2656, of the Code according to the legislative intent I apprehend would occur. The court has gone in that direction as far as actual necessities required. In harmony with manifest desire to restore the Code so far and as rapidly, as practicable, where it was impaired by judicial hostility or want of appreciation of its purpose, and to welcome legislative assistance to that end wherever needed, this occasion for progress in that line should not go unimproved to any extent. No rule of property is involved,—nothing but one of practice formulated in misconception of written law. That is error such as this and all courts customarily exercise much liberty to correct.

JUNEK and others, Respondents, vs. BUZZELLI, Appellant.

February 20—March 12, 1912.

Trial, place of: Stipulation: Pleading: Conversion: Justification: Accommodation note: Security given to maker: Release: Consent by holder of note.

1. A stipulation by the parties that an action pending in the circuit court for one county shall be tried in another county in the same circuit with like effect as if tried in the county first mentioned, is valid and binding, where the circuit court has jurisdiction of all questions of that nature, the stipulation having the effect only to waive the rights of the parties to have the case tried within the first county and before a jury thereof.
2. A complaint stating that one of the plaintiffs was owner in possession and the others were mortgagees of a stated quantity of

timber and lumber of a specified value, cut from described lands, and that the defendant unlawfully took and converted the said property and all of it to his own use, to the damage of plaintiffs in a certain sum, states a good cause of action.

3. Where the answer in such case justifies the taking and conversion by virtue of a bill of sale from one of the plaintiffs and another person to defendant as security for an accommodation note executed by the latter at the request of one of the plaintiffs, such affirmative defense of justification is deemed at issue without reply; and plaintiffs may show in avoidance of such bill of sale that part payment and substituted security in part were given to defendant, in consideration of which, prior to the alleged taking and conversion, he orally released the chattel mortgage created by said bill of sale.

4. It is not necessary in such a case that the holder of the accommodation note consent to the release of the chattel mortgage.

APPEAL from a judgment of the circuit court for Barron county: A. J. VINJE, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *W. F. McNally* and *W. T. Doar,* and for the respondents on that of *R. B. Hart* and *W. N. Fuller.*

TIMLIN, J. The parties by their attorneys stipulated in writing that this case, then pending in Barron county, should be tried at a regular term of the circuit court for Washburn county in the same circuit, "without prejudice and in like manner and with like effect and to all intents and purposes as if tried in Barron county." Accordingly the case was tried before the court and a jury in Washburn county, a special verdict returned, and judgment ordered for the plaintiff, and the papers were then certified back to Barron county, where the clerk of that court, pursuant to the order for judgment, signed the judgment appealed from.

1. It is now contended by appellant that the circuit court for Washburn county never acquired jurisdiction and that the judgment entered in Barron county is void. This contention cannot be sustained. The stipulation was not a change of the place of trial within the rule of *Swan v. Porter,* 96 Wis. 34, 70

N. W. 1068, but a valid and binding agreement to try the cause in another county and before a jury of the latter county with the same legal effect as if tried in Barron county. *Oborn v. State,* 143 Wis. 249, 126 N. W. 737. No statute has been called to our attention which avoids or conflicts with such stipulation, and such agreements are not revocable at the pleasure of one of the parties. Consent, it is true, cannot confer upon a court jurisdiction of the subject matter of the controversy, but this is not such a case. The circuit court had by law jurisdiction of all cases of this class, and consent only had the effect to waive the right of the parties to have the case tried within Barron county and before a jury of that county.

2. A complaint stating as this does that one of the plaintiffs was owner in possession and the others were mortgagees of a stated quantity of timber and lumber of the value of $2,230 (cut from described lands), and that the defendant unlawfully took and converted the said property and all of it to his own use, to the damage of plaintiffs in all in the sum of $2,230, states a good cause of action, and upon oral demurrer is sufficient.

3. Where an answer justifies the taking and conversion by virtue of a bill of sale from one of the plaintiffs and another person, as in this case, and avers that the bill of sale was executed to the defendant to secure the payment of a note for $350 signed by the defendant at the request of and for the accommodation of one of the plaintiffs, and a schedule annexed to the bill of sale therein referred to and part thereof shows that it was given as security, the affirmative defense of justification is by our statute deemed at issue without reply on the part of the plaintiffs (sec. 2667, Stats. 1898), and the plaintiffs may show in avoidance of such bill of sale that part payment and substituted security in part were given to the defendant, in consideration of which, prior to the alleged tak-

ing and conversion, he orally released the chattel mortgage created by said bill of sale.

4. In such case it is not necessary that the bank to which he gave his accommodation note consent to the release of the chattel mortgage. *Bassett v. Hughes,* 43 Wis. 319, and such like cases are not in point here. The mere fact that a surety receives security from his principal does not incapacitate the surety from dealing with his principal with reference to such security. No one but the creditor or a cosurety, under certain equitable circumstances not at all present here, can object to such release, and the bank is not here objecting. No other assignments of error seem sufficiently serious to call for further discussion.

By the Court.—Judgment affirmed.

VINJE, J., took no part.

UNITED STATES NATIONAL BANK, Respondent, vs. THE POOR HANDMAIDS OF JESUS CHRIST, Appellant.

February 20—March 12, 1912.

Taxation: Exemption: Special assessments: Property of "religious corporations:" Municipal corporations: Superior city charter.

1. A corporation organized under ch. 86, Stats., for benevolent and educational purposes, even though organized by a religious order of the same name as the corporation and incidentally conducting religious services in a hospital maintained by it, is not a "religious corporation" within the meaning of the Superior city charter (sec. 244, ch. 124, Laws of 1891), exempting "parsonages or property owned by some religious society, association or corporation" from payment of assessments for sewers, street improvements, etc.

2. *It seems* that the term "religious corporation," as used in such charter, means a corporation organized in connection with a church under ch. 91, Stats.
3. Sec. 1038, Stats., exempting property therein described "from taxation," has no reference to taxes on account of special benefits or under police regulations.
4. Statutes on the subject of taxation are to be construed, where construction is permissible, strictly against exemption.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

Action to foreclose tax-sale certificates representing special assessments under the charter of the city of Superior for the construction of a sewer.

Defendant contends that the property was exempt from such assessments under the following provision:

"No lot or parcel of land benefited in said city shall be exempt from the payment of its portion of any tax or assessment for sewers, the improvement of streets or the building or repairing of sidewalks, excepting only property belonging to the United States or the state of Wisconsin, and parsonages or property owned by some religious society, association or corporation and not used for pecuniary profit, and this shall be exempt." Laws of 1891, ch. 124, sec. 244.

Defendant owned the realty. It was organized under ch. 86 of the Statutes. Its objects were to maintain and teach parochial schools, maintain and support hospitals for the treatment of the sick, infirm and aged persons, and help the poor and distressed. It was not organized for profit, but was for the benevolent and educational purposes mentioned. It was authorized to acquire, own, and deal with all property, and do all business appropriate to the purpose of its organization, and to receive gifts to that end. The principal place of business was its hospital maintained in Superior, Wisconsin. The body was organized by a religious order of the same name as the corporation, and it was provided that the hospital property, which included the particular realty, should be in charge

of such order. Some religious services by an accredited priest of the Catholic church were commonly conducted in the hospital for the benefit of the inmates. That was incidental to the corporate business. The hospital was not a church or used as a church. It was used for the benevolent and educational purposes indicated in the corporate articles. The religious services were conducted as part of the administrative work of the institution.

The court decided that defendant was not a religious corporation within the meaning of the charter provision.

Judgment was entered accordingly.

For the appellant the cause was submitted on the brief of *W. P. Crawford.* He cited *St. Joseph's H. Asso. v. Ashland Co.* 96 Wis. 636, 72 N. W. 43; sec. 1787, Stats. (1898); *St. John's M. Academy v. Edwards,* 143 Wis. 551, 128 N. W. 113.

For the respondent the cause was submitted on the brief of *H. V. Gard.* He cited, among other cases, 24 Am. & Eng. Ency. of Law (2d ed.) 327; *Weld v. May,* 63 Mass. 181; *In re Fay's Estate,* 37 Misc. 532, 76 N. Y. Supp. 62; *Church of St. Monica v. Mayor,* 119 N. Y. 91, 23 N. E. 294; *State ex rel. Morris v. Board of Trustees,* 175 Mo. 52, 74 S. W. 990; *De Wolf v. Lawson,* 61 Wis. 469, 21 N. W. 615.

MARSHALL, J. Is appellant "a religious . . . corporation" within the meaning of sec. 244, ch. 124, Laws of 1891 (the city charter of Superior)? That is the vital question.

The statutes furnish opportunity for incorporating religious bodies. Ch. 91. Appellant does not refer to that for existence. They also provide for forming corporations in general. Ch. 86. Appellant was organized under the latter. That is significant.

It seems the term "religious . . . corporation" in the Superior charter means the same as the similar term in ch. 91 of the Statutes. It is further considered that the declared

purposes of appellant's organization fall well within one or more of the purposes for which corporations may be organized under ch. 86. That provides for corporations for "benevolent, charitable or medical institutions . . . schools, . . . hospitals, asylums or other like institutions."

The organizers of appellant, evidently, were not competent to incorporate as a religious corporation because it was essential to have a membership maintaining regular public worship as a church society, and the organization to be in connection with a church. Sec. 1990, Stats. (1898). There seems to have been a considerate purpose not to organize a religious corporation as the term is used in such section (sec. 1990), because otherwise it was not necessary to resort to ch. 86 on account of the educational and benevolent purposes mentioned in its articles. The section provides that the organization "in connection with a church" may be "for religious, charitable or educational purposes." The dominant idea in the statute is that a church with a place of regular public worship is an essential to organization of a religious corporation. It is the membership of the church, as such, that are empowered to organize,—for the purposes, primarily, of the church in the propagation of religious principles, the worshipful exercises in connection therewith, and the meetings, associations, and business incident thereto. That, ordinarily, in the main, includes a residence for the religious teacher, a church building, and the ground and other property in use and for use in carrying out the object of the organization to teach and otherwise promote religion along the lines of some particular belief.

The term "religious society," in the general sense, has often been construed by courts. It is a body of persons organized for the purpose of maintaining religious worship only. *Silsby v. Barlow,* 16 Gray (82 Mass.) 329, 330. It is a body of persons who usually meet in some stated place for worship of God and religious instruction. *Robertson v. Bul-*

lions, 9 Barb. 64, 67. A society maintained for the support of public worship. *Riffe v. Proctor,* 99 Mo. App. 601, 74 S. W. 409. Thus the meaning of the term "religious corporation" suggests, at once, the limit of the term "property of a religious corporation" in case of there not being other words expanding by inference the ordinary meaning. There were such in *Hebrew F. S. Asso. v. Mayor, etc.* 4 Hun, 446. But we have the opposite here. The words "parsonage or property owned," etc., suggest as to the latter such as is for use in connection with the purpose for which the parsonage is owned, that is for religious purposes.

For the considerations mentioned, it is considered that a corporation organized under ch. 86 of the Statutes for benevolent purposes, is not a religious corporation under the Superior charter; that the term "religious corporation" there is to be regarded as having reference to religious purposes, and the term "parsonage and other property" regarded as meaning parsonage and other property in use and for use for religious purposes as distinguished from mere benevolent or educational purposes, in the ordinary sense.

The suggestion of exemption from taxation under sec. 1038 of the Statutes hardly merits notice, since that has no reference to taxes on account of special benefits or under police regulations. *Yates v. Milwaukee,* 92 Wis. 352, 66 N. W. 248; 1 Cooley, Taxation (3d ed.) 362. The distinction has been made on the familiar principle that statutes on the subject of taxation are to be construed, where construction is permissible, strictly against exemption.

By the Court.—Judgment affirmed.

WNEK, by guardian *ad litem,* Respondent, vs. SUPERIOR SHIPBUILDING COMPANY, Appellant.

February 20—March 12, 1912.

Master and servant: Injury: Unsafe place to work: Scaffolding: Duty of master: Negligence of fellow-servants.

1. **The duty of a master to furnish for his servants a reasonably safe place in which to work is an absolute duty which cannot be delegated.**
2. **In an action for injuries sustained by a member of a riveting crew in defendant's shipyard, caused by the collapse of a scaffold on which he was working, evidence showing, among other things, that the scaffold was built by a separate crew working independently of the plaintiff, that material used therein was defective, and that the defect was discoverable by inspection before such material was placed in the scaffold, is *held* to show that defendant had not performed its duty to furnish a reasonably safe place to work and that the negligence was not that of fellow-servants.**

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

This is an action to recover damages for personal injuries received by the plaintiff while employed by the defendant as helper to an operator of a dolley or riveting device.

On April 16, 1910, repairs were being made in defendant's dry dock of its shipyards at Superior to the deck of a steel freight boat. In the performance of his duties the plaintiff worked upon a structure in the hold of the boat composed of a scaffold covered with planks which formed a floor four or five feet below the deck upon which the repairs were being made. The scaffolding was composed of a steel beam fastened to the side of the boat, a twelve-foot plank parallel thereto at a distance of about eight feet, and three cross-planks nine feet long which spanned the area between the twelve-foot plank and the steel beam. The floor on which the plaintiff and the riveter worked was composed of three or

four planks laid loosely upon the scaffold. These planks were moved about by the riveter as necessity required during the progress of the work. Sometimes additional planks were placed under the dolley to raise it sufficiently to be within reach of the place where the riveting was being done.

The hatches of the boat which was being repaired ran across the deck and were twelve feet from center to center. Crossing the hold between the hatches were steel arches. Running along the sides of the boat four or five feet below the deck were steel beams about twelve inches wide. The twelve-foot plank was placed with the ends resting on two of the arches. The nine-foot planks were placed so that there was one at each end and one at the center of the plank resting on the arches. This composed the scaffold. This scaffold was built prior to the riveters starting work and by a separate crew of men. The planks required for the floor were also placed upon the scaffold by this crew. If the riveter required more floor planks, men were at hand to get them for him; if he needed only one more plank he usually got it himself. The ends of the hatches were about six feet from the sides of the boat so that the platform extended three feet under the open hatch.

The rivets were heated to a red heat upon the deck and handed with a pair of tongs to the plaintiff, who stood in the hatchway upon the floor on the scaffold. He either placed it in the proper hole or handed it to the "holder-on," who placed it. When the rivet was in place the holder-on applied the compressed air and pressed the dog of the dolley up against the rivet to hold it in place while it was being riveted from the other side of the deck. If the rivet was placed through the top of the deck the riveting was done by the dolley from below.

The plaintiff had been working for the defendant for eight or nine days when he was injured. Work at riveting on the boat in the dry dock had been first started that morning. At

about a quarter to 12 o'clock the plaintiff had received a rivet and had handed it to the holder-on. The holder-on had placed it in position and applied the compressed air in the dolley, the dog of the dolley had been jammed up against the rivet, and the riveting had been started from above the deck, when the scaffolding gave way and the holder-on and the plaintiff fell into the bottom of the hold, a distance of eighteen or twenty feet. The holder-on was killed and the plaintiff suffered the injuries for which he seeks to recover. One of the nine-foot planks of the scaffold had broken at a knot in the plank.

The jury returned a verdict finding that the defendant had furnished suitable material for constructing a safe scaffold for the men working thereon, that the material of which the scaffold was constructed was not fit and proper, and that the plaintiff exercised ordinary care for his own safety. The damages were assessed by the jury at $800; $400 being assessed to cover the future. This is an appeal from a judgment on the verdict.

For the appellant there was a brief by *Hanitch & Hartley,* and oral argument by *C. J. Hartley.*

For the respondent there was a brief by *Charles Line,* attorney, and *Frank E. Jenswold,* of counsel, and oral argument by *Mr. Line.*

SIEBECKER, J. The foregoing statement of facts shows that the plaintiff was a member of the riveting crew engaged in making repairs on the boat and that the defendant furnished a scaffold in the hold of the boat on which he was required to perform his duties. It appears that the scaffold was built by employees of the defendant who were not a part of the riveting crew to which plaintiff belonged, and that the only duty plaintiff had respecting his working place was the placing of such additional planks on the scaffold as might be needed for the floor and for erecting a suitable stand on the

scaffold for the riveting machine. From this it is manifest that the erection of the scaffold was part of the defendant's duty in preparing a place for plaintiff to work. See *Parker v. Fairbanks-Morse Mfg. Co.* 130 Wis. 525, 110 N. W. 409; *Cadden v. American S. B. Co.* 88 Wis. 409, 60 N. W. 800. Under these circumstances the measure of defendant's duty was as declared in *Howard v. Beldenville L. Co.* 129 Wis. 98, 108 N. W. 48, namely, to furnish plaintiff a reasonably safe place in which to work. Such duty was an absolute one which could not be delegated by the master. We are satisfied from the evidence that the jury were justified in finding that the material used by the scaffold builders was not such as made the scaffold a reasonably safe one. The evidence shows that one of the planks was imperfect and that this defect was discoverable by inspection of it before it was placed in the scaffold. This evidence establishes that the master had not performed its duty of furnishing plaintiff a safe place to work and that the negligent construction of the scaffold was due to the carelessness of the scaffold builders, who worked independently of the plaintiff and were wholly separated from his duties.

It is suggested that the plaintiff's failure to place additional planks on the scaffold to support the riveting machine was a contributing cause to produce his injuries. It is manifest from the facts shown that the use of additional planks for this purpose would not in any way have made the scaffold more safe, and this, therefore, can have no bearing on defendant's liability for its want of care in furnishing plaintiff a safe scaffold to work upon.

By the Court.—Judgment affirmed.

FARLEY, Respondent, vs. SPRING GARDEN INSURANCE COMPANY, Appellant.

February 21—March 12, 1912.

Fire insurance: Breach of condition invalidating policy: Pleading: Defensive matter: Order of proof: Estoppel: Notice: Renewal of policy: Information to be furnished: Evidence: Value of property destroyed: Opinion of owner.

1. In an action upon an insurance policy breach of a condition rendering the policy void is a matter of defense.
2. It was not error in such a case to permit plaintiff to introduce evidence of an estoppel in anticipation of the defense of breach of such a condition.
3. Although the Wisconsin standard policy contains a provision that it "shall be void if the subject of insurance be a building on ground not owned by the insured in fee simple," yet a company issuing such a policy and receiving and retaining the premium with knowledge that the insured does not own the land upon which the building stands is estopped from declaring the policy void.
4. The company's knowledge of such fact at the time of issuing a policy is equally binding upon it when it issues a renewal thereof; and it is immaterial whether the company's agent had in mind, at the time of the renewal, the information which he had received when the original policy was issued.
5. Under sec. 1941—51, Stats. (1898), it is not necessary for the insured, at the time of renewal of a policy, to furnish any information except as to increase of hazard, and the renewal is subject to the terms and conditions of the original policy.
6. The owner of insured property which is destroyed, consisting of a building and other common articles of personal property, is competent to give his opinion as to the value thereof. *Allen v. C. & N. W. R. Co.* 145 Wis. 263, distinguished.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

This is an action brought to recover upon a Wisconsin standard fire insurance policy. The complaint alleges the corporate existence of defendant; the issuance of the policy, by the terms of which plaintiff's building was insured in the

sum of $700 and the furniture in the sum of $300, and that on March 14, 1911, and while the policy was in force the property was destroyed by fire, which did not happen from any of the causes excepted in the policy; that the building was of the value of $1,000 and upwards and the furniture of the value of $1,000 and upwards; that the plaintiff performed all the conditions on his part to be performed and made due proofs of loss; that defendant denied all liability under the policy and refused to pay, assigning as a ground and reason therefor that said building stood upon leased ground; that plaintiff had no other insurance on the property, and by reason of the premises defendant became indebted to plaintiff in the sum of $1,000, which has not been paid.

The answer admitted the corporate existence of the defendant, the issuance of the policy, and the destruction of the property by fire, and alleged that the defendant was induced to issue the policy relying upon false representations to the effect that the plaintiff was the owner in fee of the land upon which the building stood, when in fact he was not the owner, which false representations, by the terms of the policy, rendered it void, and that no agreement had been made by the defendant waiving said condition in the policy.

The court directed a verdict in favor of the plaintiff. Motion for a new trial was denied and judgment rendered in favor of the plaintiff, from which this appeal was taken.

W. B. Quinlan, for the appellant.

C. R. Fridley, for the respondent.

KERWIN, J. It appears from the evidence offered by the plaintiff that in June, 1909, the defendant insured the property in question for one year, and at the time of making application for insurance plaintiff informed the agent of defendant who issued the policy that he did not own the land upon which the building stood, and stated to the agent the nature of his title. The policy contained the following provision:

"This entire policy shall be void if the subject of insurance be a building on ground not owned by the insured in fee simple." At the expiration of the year and in June, 1910, the defendant through its agent renewed the policy and issued a policy to plaintiff upon the same property and delivered it to him through the mail, which is the policy in suit. No information was given to defendant subsequent to the issuance of the first policy and prior to the time the renewal policy was issued.

It is contended by appellant that the policy was void because the building stood upon leased ground, and that in order to admit evidence of estoppel the plaintiff was bound to plead the facts showing estoppel. The action being upon the policy, a breach of the condition referred to rendering the policy void was matter of defense. *Gans v. St. Paul F. & M. Ins. Co.* 43 Wis. 108; *Redman v. Ætna Ins. Co.* 49 Wis. 431, 4 N. W. 591; *Cronkhite v. Travelers Ins. Co.* 75 Wis. 116, 43 N. W. 731; *Denoyer v. First Nat. Acc. Co.* 145 Wis. 450, 130 N. W. 475.

It appeared upon the plaintiff's showing in making his case that the building stood upon leased ground, and the plaintiff then offered evidence, which was received over objection, to the effect that the defendant had knowledge before the first policy was issued that the building insured stood upon land not owned by plaintiff. It may well be that this evidence was offered out of order, and that plaintiff was not obliged to anticipate the defense, or offer any evidence of estoppel until defendant had made his proof on the subject of breach of the condition to the effect that the policy should be void if the building which was the subject of the insurance be on ground not owned by the insured in fee simple. 19 Cyc. 926; *Gardner v. Continental Ins. Co.* (Ky.) 75 S. W. 283. No error was committed in the admission of the evidence offered by plaintiff in making out his case.

The principal contention of the appellant's counsel under

this head seems to be that the evidence offered to show estoppel was not within the issues, because the plaintiff had brought suit upon the Wisconsin standard policy, and to allow the proof would be to nullify the condition and practically eliminate it from the policy. The argument is ingenious, but unsound. It is admitted that the policy sued upon was the standard policy as alleged in the complaint, but that the condition referred to was rendered inoperative by knowledge on the part of the defendant, before issuance of the first policy, of the fact that plaintiff was not the owner of the ground in fee. The undisputed evidence shows that the defendant had knowledge that plaintiff did not own the land upon which the insured building stood, and issued the first policy and received and retained the premium with such knowledge. This, upon well settled principles, estopped the defendant from declaring the policy void or changing its position to the prejudice of the plaintiff. *Welch v. Fire Asso.* 120 Wis. 456, 98 N. W. 227. It appears from the evidence that notice to the defendant that plaintiff was not the owner of the land was brought to the defendant shortly before the first policy was issued in June, 1909, and that the renewal policy, the one in suit, was issued in June, 1910, and just before the first policy expired. The notice to the defendant at the time of issuance of the first policy was binding upon defendant at the time of issuance of the renewal. Sec. 1941—51, Stats. (1898), provides:

"This policy may, by a renewal, be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal or this policy shall be void."

Under this statute it seems clear that it was not necessary at the time of renewal to furnish any information, except as to increase of hazard, and that the renewal was subject to the terms and conditions of the original policy. This has been

held to be the rule independent of statute. *Bickford v. Ætna Ins. Co.* 101 Me. 124, 63 Atl. 552; *Aurora F. & M. Ins. Co. v. Kranich,* 36 Mich. 289.

It is established without substantial dispute that one Halmer Forslund was the agent of defendant in 1909 and 1910 and issued both policies. Error is assigned because the court sustained an objection to the following question asked Forslund by counsel for appellant:

"*Q.* You may state whether or not at the time that policy was sent out, the policy of 1910, and which is sought to recover on in this suit, you had in mind or knew anything about this property or building which is included in the policy being on leased ground at that time?"

There was no error in this ruling. This question related to the time the renewal policy was issued, and it is obvious from what has been said that whether the agent had in mind, at the time the renewal policy was sent out, the information received when the first policy was issued, is wholly immaterial. The renewal policy was issued upon the conditions known to exist by the defendant at the time the original policy was issued.

There was no evidence offered by defendant as to value of the property destroyed. The plaintiff testified to the value of the property, and error is assigned because he was permitted to testify over objection to such value, upon the ground that he was testifying as to his opinion and that he was not qualified to give an opinion in that regard. *Allen v. C. & N. W. R. Co.* 145 Wis. 263, 129 N. W. 1094, is relied upon by defendant on this point. An examination of that case will show that it is not in point. The property there was a portable sawmill and some lumber. The only evidence, except as to some minor items of lumber on hand, was that of the plaintiff as to the price paid for the property when new. The machinery had been in use four years and had been through one fire. Moreover, the court held that it was evi-

dent that the value fixed by the jury was excessive. The appellant here, however, seems to rest its contention on the ground that there was no competent evidence of value. The plaintiff, being the owner of the property destroyed, which property consisted of a building and other common articles of personal property, was competent to give his opinion of the value. 17 Cyc. 113, 116; *Palmer v. Goldberg,* 128 Wis. 103, 107 N. W. 478; *Gorman v. Park,* 100 Fed. 553; *Reebie v. Brackett,* 109 Ill. App. 631; *Porter v. Hawkins,* 27 Mont. 486, 71 Pac. 664; *Houghtaling v. C. G. W. R. Co.* 117 Iowa, 540, 91 N. W. 811.

We find no prejudicial error in the record and think the court below was right in directing a verdict for plaintiff.

By the Court.—Judgment affirmed.

NORDEAN, by guardian *ad litem,* Appellant, vs. MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Respondent.

February 21—March 12, 1912.

Statutes: Construction: Railroads: Fences, when required: "Commencing to operate."

1. Upon a question of statutory construction precedents are an unsafe and unsatisfactory guide, because they rarely present precisely similar language relating to the same subject matter and in the same connection and surroundings.
2. Consideration of the purpose and object of the statute is a recognized aid to interpretation if, after examining the statute itself and applying it to the subject matter regulated thereby, there still exists an ambiguity.
3. But if a statute standing by itself, without resort to rules of interpretation, conveys a definite and clear impression when applied to the subject regulated, that is the best evidence of its meaning.

4. The rule that dropping words out of a statute in a revision and re-enactment thereof indicates an intent to change the statute in that respect, cannot prevail against the plain meaning of the statute as rewritten, whether such words be simply omitted or a new form of expression be substituted therefor.
5. A railroad company does not commence to "operate" its road, within the meaning of sec. 1810, Stats. (1898), requiring it to fence its right of way within three months after so commencing, until it commences to use the road for transporting freight or passengers as a common carrier.

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *John Brennan* and *Charles Line,* and oral argument by *Mr. Brennan.*

For the respondent there was a brief by *Luse, Powell & Luse,* attorneys, and *Alfred H. Bright* and *John L. Erdall,* of counsel, and oral argument by *L. K. Luse.*

TIMLIN, J. The complaint in this action showed that the plaintiff was ten years of age and appeared by guardian *ad litem,* and that on October 23, 1909, and for a long time prior to that day the defendant railway corporation was, ever since has been, and now is, operating and running a railroad for gain and profit, running engines and cars over and upon its tracks in Douglas county, and that its right of way was unfenced. The answer contains a number of specific admissions, followed by a general denial, among them the admission that the right of way was not fenced. The injury in question occurred on the 23d of October, 1909. The negligence averred is in failing to erect, build, and maintain fences along its track on both sides thereof, and in other things not relevant here. As we construe the pleadings there is no admission that the defendant was operating the railroad in question for three months prior to October 23, 1909.

The injured boy resided with his parents in the city of Superior and had wandered in boyish play with a companion of

about his age some distance into the country and on to the railroad track at the place of accident, where he evidently attempted to take hold of a passing freight train for some purpose. There was no fault or negligence on the part of the train crew. Plaintiff was not injured upon any public or other crossing place, but stood on the loose gravel next to the rail when the train came. The loose gravel slipped in under and his right leg got on the rail and two wheels ran over it. He does not know exactly what happened. After proof of the injury and proving that the place in question was not upon any depot grounds, the plaintiff rested. The defendant proved that it began to haul freight into Superior on this track on September 10, 1909, and that was the first operation for business; that the first passenger service commenced November 29, 1909. The railroad in question had just been built and was not entirely completed.

On motion the circuit judge directed a verdict for the defendant upon the ground that the railroad had not been in operation for three months prior to the time when the boy was injured, hence the obligation to fence had not arisen. There was a change of attorneys for plaintiff. The plaintiff moved to set aside the verdict and for a new trial on the ground that the verdict was contrary to the evidence and to the law and on the ground of newly discovered evidence which the plaintiff's former counsel, through mistake, inadvertence, and inexcusable neglect, failed to discover and produce at the trial. On this motion he also asked to be allowed to make and file an amended complaint. The moving papers averred that the guardian was advised by plaintiff's attorney that all that was necessary to fix the liability of the defendant was to show that the railroad was not fenced and was not used by the defendant for depot grounds at the time and place of the injury. She afterward learned that it was necessary to prove that the defendant commenced to operate its railroad more than three months prior to the time of the

injury. That it was operated for more than three months prior to the injury she has since discovered to be the fact as shown by certain affidavits annexed to hers. The first of these affidavits is by the former attorney for plaintiff, in which he states that he had learned since the trial that the defendant commenced on July 6, 1909, to operate its railroad at the point thereon where the plaintiff was injured, and continued since. The next by Gust Anderson, made apparently on personal knowledge, is to the effect that the defendant on or about July 6, 1909, commenced to operate its railroad between a point in the city of Superior where the railroad crosses Sixty-fourth street and a point southerly therefrom where the said railroad crossed the track of the Great Northern Railway in the town of Superior, covering the place of accident, and continued ever since running engines, cars, and trains thereon. Four others depose to the same effect. The amended complaint which was offered on the motion avers, among other things, on information and belief, "that on or about said 3d day of July, 1909, and for more than three months prior to the said 23d day of October, 1909, the defendant commenced to operate its railroad, from said city of Superior south, through the said town of Superior, and past the point on said railroad, in said town of Superior, where the plaintiff was injured, by running over and upon the track of said railroad locomotive engines, cars, and trains."

The court allowed the amended complaint to be filed, but denied the motion for a new trial upon the grounds stated in the order,

"(1) That no error of law was committed upon the trial; (2) that the affidavits regarding the discovery of new evidence do not show reasonable or proper diligence on the part of the plaintiff or his attorneys in endeavoring to discover such evidence and to produce it upon the trial; (3) that the law does not require a newly built or constructed railroad to be fenced until three months after the commencement of the operation of the railroad for business other than mere construc-

tion work; (4) that the only ground of surprise for counsel for plaintiff upon the first trial was the ruling of the court that sec. 1810 did not make the defendant responsible for failure to fence its railroad until three months after it commenced to operate the same; (5) that the mistake of counsel for the plaintiff upon the first trial, if any, was a mistake of law in construction of sec. 1810."

Several interesting questions are discussed by counsel, but the principal controversy, and that which determines the case on this appeal, relates to the meaning of the words "to operate the same" found in sec. 1810, Stats. (1898), in the following sentence: "All roads hereafter built shall be so fenced and such cattle-guards be made within three months from the time of commencing to operate the same, so far as operated." Does the word "operate" mean the running of trains upon the finished or partially finished portions of the new roadbed for construction purposes, or does it mean such running in the transportation of goods or passengers? The affidavits upon the motion for a new trial do not specify which of these the affiants meant by operation. The amended complaint evidently relates to construction work. If the statute means operation in the regular business of the road, carrying goods and passengers, the affidavits are not sufficiently explicit to overcome the evidence given at the trial, and besides it is conceded by counsel upon the oral argument that if the latter is the true meaning all his other grounds of appeal must fail. A masterful argument is submitted for appellant consisting of, first, a reference to the following precedents bearing upon the meaning of the word "operate:" *Glandon v. C., M. & St. P. R. Co.* 68 Iowa, 457, 27 N. W. 457; *Chicago, K. & W. R. Co. v. Hutchinson,* 45 Kan. 186, 25 Pac. 576; *Houston & G. N. R. Co. v. Meador,* 50 Tex. 77; *McKivergan v. Alexander & E. L. Co.* 124 Wis. 60, 102 N. W. 332; *Chicago, K. & W. R. Co. v. Totten,* 1 Kan. App. 558, 42 Pac. 269; *Rockford, R. I. & St. L. R. Co.*

v. Heflin, 65 Ill. 366; *Holden v. R. & B. R. Co.* 30 Vt. 297; *Hardt v. C., M. & St. P. R. Co.* 130 Wis. 512, 110 N. W. 427; *Meo v. C. & N. W. R. Co.* 138 Wis. 340, 120 N. W. 344. Second, a contention that the purpose of the act is to protect persons who might be on or near the track, and such persons are in as much danger from the operation of a construction train as from a freight or passenger train run for hire, so that the purpose of the statute would be defeated by denying redress to those injured by the construction train. Third, an argument to the effect that sec. 1810 is a revision of secs. 30 and 32 of ch. 119, Laws of 1872; ch. 328, Laws of 1878; and ch. 193, Laws of 1881. Prior to the revision the first two chapters had been construed in *Curry v. C. & N. W. R. Co.* 43 Wis. 665, to be each in force independently but to be cumulative, one penal and the other remedial. In ch. 328, Laws of 1878, the statute read: Operating "in carrying goods and passengers" for two years through inclosed lands. Dropping out the words "in carrying goods and passengers," by the revision, indicated a legislative intent to remove that limitation by repeal and to include in the revision both kinds of operation. Precedents are then cited regarding the effect of dropping out such descriptive words and holding that this is an indication of legislative intention to change the statute in that respect so that the word "operate," found in the new or revised section, should no longer be subject to that limitation, but extend to all manner of operation, whether for construction or for commercial purposes. Citing *State v. Welch,* 37 Wis. 196; *State ex rel. Ohlenforst v. Beck,* 139 Wis. 37, 119 N. W. 300; *Bentley v. Adams,* 92 Wis. 386, 66 N. W. 505; and other cases.

With reference to the first group of precedents cited by appellant's counsel it may be said that, where the sole inquiry relates to the intention of a writer to be derived from a writing containing neither technical nor trade terms nor fixed symbols, precedents are weak and unsatisfactory, except when

they relate to the form of instruments, which form may be employed to bring the matter in hand within some established rule. But in other cases they rarely if ever present the same words arranged in the same order in the same kind of sentence relating to the same subject and surrounded by like supplementary or explanatory writings, paragraphs, or sections, and illustrated by other instances of usage in the same instrument or statute. *Sisson v. Seabury,* 1 Sumn. 235; *Wentworth v. Fernald,* 92 Me. 282, 42 Atl. 550; *Jones v. Hunt,* 96 Tenn. 369, 34 S. W. 693; *In re Morgan,* [1893] 3 Ch. 222; *Thurber v. Battey,* 105 Mich. 718, 63 N. W. 995; *Grey v. Pearson,* 6 H. L. Cas. 61; *Littig v. Hance,* 81 Md. 416, 32 Atl. 343; *Lessee of Williams v. Veach,* 17 Ohio, 171; *State ex rel. Bashford v. Frear,* 138 Wis. 536, 120 N. W. 216. Without such similarity they may sometimes mislead rather than guide aright, where the sole inquiry before the court is what was the intention of the writer. Nor can the fact that the construction train is as destructive as the commercial train, and that the object of the statute is to protect life and property, control its interpretation in this respect. Such consideration is a recognized aid to interpretation when we are considering the scope of the statute, and, after a survey of the writing and application thereof to the subject of the writing, there still exists an ambiguity. But this might be an unsafe guide in the determination of when the statute went into effect. So, although dropping the words out of a former statute, and its revision and re-enactment without those words, is a good indication that the legislature intended to change the statute to that extent, this cannot prevail against the apparent meaning of the statute as rewritten or as against a statute in which, by a different form of expression, the legislature again carried the former requirement into the statute. The construction given to the word "operating" as found in sec. 1816, Stats. (1898), in *McKivergan v. Alexander & E. L. Co.* 124 Wis. 60, 102 N.

W. 332, is not decisive of the meaning of the words "commence to operate" in sec. 1810. The former statute relates to a kind or description of work in which an employee might be injured, while the latter purports to specify a definite time in the existence of the railroad at which the three months' limitation begins to run. Before resorting to such rules of interpretation we must turn to the words of the statute in question (*In re Will of Bouck,* 133 Wis. 161, 111 N. W. 573, 113 N. W. 452). If this statute standing by itself, without resort to rules of interpretation, conveys a definite and clear impression when applied to the subject matter regulated thereby, this is the best evidence of the meaning of the statute. We all appreciate, and other statutes on this subject recognize, a material distinction between construction and operation of a railroad. In construction, beginning with track laying, engines and cars are used and moved, following up the track laying, for the purpose of delivering the rails, and next for ballasting, reducing or raising the grades in certain places, or completing fills. A portion of the road varying in length from day to day is partially completed in track laying, and the road may at this time be said to be in operation for construction purposes. It is not an operation for the purpose of transporting goods and passengers. It is clearly not in operation within the meaning of secs. 1799 and 1799*a,* Stats. (1898), which require railroad corporations operating a road to receive freight and deliver a bill of lading and transport the same over its road. Taking up the sentence in question we first discover that it apparently applies to roads built, not to those in process of building. Next, that it contemplates or includes a road a portion of which is operated; and third, that the three months must begin at some definite time as to the whole road or as to that portion operated. There is in the sentence a noticeable antithesis between the words "built" and "commencing to operate." If we substitute the alleged synonyms this becomes apparent. "All roads hereafter built

shall be so fenced . . . within three months from the time of commencing to complete the construction by the use of trains so far as the road is completed or operated in that way." The misfit is apparent. On the other hand it does not suggest any confusion of thought to read the sentence in question: All roads hereafter built shall be so fenced . . . within three months from the time of commencing to use the road for the transportation of freight and passengers so far as the road is used for that purpose. There must have been in contemplation some definite time for the commencement of the three-months period of grace, consequently some definite way of ascertaining what portion of the road was then operated or in operation. This could not be done if train construction work is "operating" within the meaning of the statute. For train work in construction begins with track laying and progresses from day to day, sometimes with uniformity, sometimes not, so that it would be difficult or impossible to tell whether any given half mile of road had been three months in this kind of operation or not. The statute relates to a built road, to a kind of operation which follows building, and has a definite time of commencement as to the whole or some definite section of the road. It must mean either operation in construction or operation in the transportation of freight and passengers. It forbids us to divide operation in construction. We must either include all construction train operation or exclude it all. There is no warrant for dividing this, because the statute mentions only a single definite condition. Therefore we must begin with track laying, being the first train construction service, or we must begin with operating as a common carrier. The road is not built when the first is begun: it is when the second is begun; the first furnishes no definite starting point as to any section of the road capable of exact identification; the latter does. Many other statutes relating to railroads use the words "operating" in the sense of transporting freight and passengers and so as

to exclude construction work. Secs. 1799, 1799*a*, 1801, 1802, 1820, Stats. (1898). Operating a road is not like operating cars or engines on a road. The words "commencing to operate," applied to a road, suggest a completed road and exclude construction work.

We are convinced that it was the legislative intention, apparent on the face of the statute, that the railroad company commenced to operate when it commenced to transport freight or passengers as a common carrier, and that the operation of trains in construction work cannot be taken as the point of commencement, although after having commenced operations and after three months had elapsed it would be liable for injuries caused by a construction train engaged in making repairs as well as by any other train under sec. 1810, Stats. (1898). It follows that the judgment and order denying a new trial should be affirmed.

By the Court.—Order and judgment affirmed.

DUNN, imp., Respondent, vs. CITY OF SUPERIOR, Appellant.
SAKRISON and others, imp., Appellants, vs. CITY OF SUPERIOR, Respondent.

February 21—March 12, 1912.

Municipal corporations: Street improvements: Special assessments: Appeal, when lies: Relief granted: Mistake of fact: Extension of time for payment: Waiver of objections: Right to withdraw application: Election between remedies: Estoppel.

1. In proceedings to pave a street under ch. 539, Laws of 1909 (secs. 959—30*a* to 959—30*j*, Stats.), a property owner need not appear before the board of public works or the city council and make objections to the assessment in order to entitle him to appeal from the final determination of the council, pursuant to sec. 959—30*g*.

2. By ch. 539, Laws of 1909, creating secs. 959—30*a* to 959—30*j*, Stats., the new sections are virtually made a part of sec. 959—30, Stats. (Supp. 1906), being addenda thereto; and the provisions of said sec. 959—30 and of sec. 959—31, Stats. (1898), relating to extension of the time for payment of assessments for street improvements, apply to improvements made under said new sections.
3. The remedy of the property owner by appeal from the determination of the council, under sec. 959—30*g*, Stats. (Laws of 1909, ch. 539), being exclusive, the court in such cases will grant either equitable or legal relief or both, as the case may require.
4. Equity will ordinarily relieve against a mere mistake of fact where no laches is shown and the other party has not materially changed his position relative to the subject matter.
5. The option given the property owner by sec. 959—31, Stats. (1898), to have the time for payment of his assessment extended upon condition that he waive any illegality or irregularity in such assessment, was within the province of the legislature to grant or withhold, and such condition is valid.
6. The privilege granted upon such condition is analogous to the right of an election between inconsistent remedies, and a property owner having once applied for an extension and waived all objections to the assessment cannot afterwards withdraw such application and waiver.
7. The fact that he did not know, at the time of applying for an extension, that his property had previously been assessed for street paving or that the cost of such previous paving had not been credited in making the new assessment, does not entitle him to relief, since the statute gives him thirty days for investigation.
8. Waiver is the voluntary relinquishment of a known right. In this case plaintiffs voluntarily relinquished the right to contest the assessment, knowing that they had such right, though not knowing the facts which would make such a contest successful.
9. The city having determined to accept extensions, is bound to accept all applications therefor which are legally made, and no action on its part to show acceptance is necessary to render them effective.
10. In cases within the statute the privilege of the extension is an adequate consideration for the waiver required, and the doctrine of estoppel, which would bar a withdrawal of the application only in case the city had materially altered its situation relative to the matter, is therefore not applicable.

BARNES, J., dissents.

APPEALS from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

Plaintiffs owned certain lots abutting on Hughitt avenue in the city of *Superior,* purchased by them in 1909, and on which they have resided since the purchase thereof. In 1892 Hughitt avenue was paved, and the lots in question paid more than $2 per square yard for such paving. In 1910 proceedings under ch. 539, Laws of 1909, were instituted to repave the avenue. Certain defects in these proceedings are claimed by plaintiffs, which are not necessary to be set out. On May 25, 1910, and June 11, 1910, a resolution of the board of public works was published in the official paper of the city, which resolution gave the owner or owners of any lots assessed for benefits on account of the repaving of Hughitt avenue the option and the right, at any time within thirty days after the passage and publication of the resolution, to apply for an extension of the time of payment of the assessment for benefits. In the latter part of June, 1910, the plaintiffs *Edward Sakrison, Alexander Grant,* and *John A. Landgren,* respectively, presented to the board of public works of the city of *Superior* a request, in writing, for an extension of the time of payment of the assessment of benefits which, conformably to sec. 959—31, Stats. (1898), contained the following clause:

"I agree that in consideration of the privilege granted by such resolution to make no objection to any want of power, illegality, or irregularity in regard to the assessment against my property."

A similar written request was made by O. E. Dunn, the husband of the plaintiff *Jessie B. Dunn,* and presented to the board of public works, but the same was signed and presented without the authority, knowledge, or consent of the plaintiff *Jessie B. Dunn.* On June 30, 1910, *Edward Sakrison* signed and sent to the board of public works of the city of *Superior* a letter, as follows:

"Gentlemen: Some time ago I signed application praying for an extension of payment on the Hughitt avenue pavement.

The same was presented to you through the Geo. G. Newton Co., of your city. I wish to withdraw said petition and ask that it be set aside and that you make the same null and void."

This letter was received by the board on or about July 5, 1911. The plaintiffs *Alexander Grant* and *John A. Landgren,* respectively, on June 28, 1910, signed and presented to the mayor and common council a notice requesting that they be permitted to withdraw their petition for the extension of the time of payment for such assessment. On October 21, 1911, the plaintiffs *Sakrison, Grant,* and *Landgren* signed and caused to be served upon the chairman of the board of public works, and also exhibited to another member of said board, a notice, duly signed, which contained a description of their property, and a formal withdrawal and cancellation of their former request for an extension of the time of payment of said assessment. They had no information or knowledge that the property, or any part thereof, had been assessed or had paid any part of the cost of the pavement of said Hughitt avenue in the year 1892, or at any other time prior to the making of the assessment for the paving of 1910, and none of said plaintiffs had any knowledge or information that the assessment for the pavement of 1910 had been made upon their property without giving credit or deducting the amount previously paid for assessments thereon, and they had no knowledge or information on that subject until the time immediately preceding the taking of their appeal. None of the proceedings in the making of the assessments, benefits, or cost of the work upon the plaintiffs', or any of the plaintiffs', property showed upon their face or otherwise anything regarding the assessment previously paid for the pavement of 1892 or whether any such deduction had been made. They were, however, aware of the fact that Hughitt avenue, opposite their lots, had been previously paved with cedar blocks, and they also knew that the work of repaving was carried on in 1910.

None of the plaintiffs appeared before the board of public works or before the common council of the city of *Superior* and made objection to the assessment made by said board of public works or to the confirmation thereof by the common council, and never in any manner made objection to such assessment before said board of public works or the said common council at or prior to the time when the same was confirmed by said common council. The board of public works took no action upon the requests of the plaintiffs for an extension of the time of payment of the special assessment or upon the petitions for the withdrawal of such requests. Neither did the board of public works take any action with reference to issuing any bonds against the lots of the plaintiffs or any of them. On the 24th day of October, 1911, John Erickson, the city comptroller, countersigned and issued bonds against the plaintiffs' property, and each of them, and delivered the same to the contractor on October 25, 1911.

The plaintiffs appealed to the circuit court, pursuant to sec. 959—30*g*, Stats. (Laws of 1909, ch. 539), from the final determination of the common council of the defendant city as to the assessment for benefits.

From a judgment entered in the circuit court in favor of the plaintiff *Jessie B. Dunn,* the city of *Superior* appealed; and the plaintiffs *Sakrison, Grant,* and *Landgren* appealed from a judgment entered in favor of the defendant.

For the plaintiffs there was a brief by *Luse, Powell & Luse,* and oral argument by *L. K. Luse.* They cited, *inter alia, Covington v. Schlosser,* 141 Ky. 838, 133 S. W. 987; *Kenny v. Kelly,* 113 Cal. 364, 45 Pac. 699; *Lewis v. Cook,* 57 Wash. 1, 106 Pac. 198; *Monroe W. W. Co. v. Monroe,* 110 Wis. 11, 85 N. W. 685; *Swedish Am. Nat. Bank v. Koebernick,* 136 Wis. 473, 117 N. W. 1020; *Belknap v. Bender,* 75 N. Y. 446; *Smith v. Burns B. & M. Co.* 132 Wis. 177, 111 N. W. 1123; *Ripley v. Ætna Ins. Co.* 30 N. Y. 136; *Jorgenson v. Superior,* 111 Wis. 561, 87 N. W. 565.

For the defendant there was a brief by *R. I. Tipton,* city attorney, and *T. L. McIntosh,* assistant city attorney, and oral argument by *Mr. Tipton.*

VINJE, J. The appeal of the city of *Superior* presents but one question not heretofore determined in the case of *Newton v. Superior,* 146 Wis. 308, 130 N. W. 242, 131 N. W. 986, and that is: Must a property owner, in proceedings to grade a street under ch. 539, Laws of 1909 (sec. 959—30*a* to sec. 959—30*j,* Stats.), appear before the board of public works or the city council and make objections in order to entitle him to appeal pursuant to sec. 959—30*g,* Stats.? We think not. There is nothing in the appeal statute that requires any appearance by the property owner at any stage of the proceedings in order to entitle him to appeal. It says:

"If the owner of any parcel of land affected by such determination of the council feels himself aggrieved thereby, he may within twenty days after the date of the first publication of such notice of final determination appeal therefrom to the circuit court."

No conditions whatever are by the statute attached to the right to appeal, and the court can make none. Moreover, it is clear from the proceedings to be had that a property owner may not know until the council has made its final determination pursuant to subd. 8, sec. 959—30*f,* whether or not he is aggrieved. Said section provides that "the council may determine the amount to be paid by the real estate as benefits on account of such improvement of such street or alley, and the amount that shall be paid by the city at large or the ward funds or the wards in which such improvement is made." Until the council makes such final determination the property owner cannot know what he is required to pay. The city or the wards may be required to pay all. It would be idle to require him to object before the objection could attach to anything determined, even provisionally. The cases cited by

counsel for the city, bearing upon this question, relate to entirely different statutory or charter provisions, and nothing would be gained by distinguishing them from the case at bar. Our own statute is plain and must govern. The appeal given by it is the only remedy the property owner has. *Newton v. Superior,* 146 Wis. 308, 130 N. W. 242, 131 N. W. 986. Such exclusive remedy should not be burdened by any conditions not clearly expressed or implied by the terms of the act granting it.

On plaintiffs' appeal two questions present themselves for determination: First, Do sec. 959—30, Stats. (Supp. 1906), and sec. 959—31, Stats. (1898), relating to the extension of the time of payment of the assessment, apply to improvements made under ch. 539, Laws of 1909? and, second, If so, could the plaintiffs withdraw their requests for an extension of the time of payment of the assessment after making an application therefor to the board of public works as provided by sec. 959—31, Stats. (1898)?

Ch. 539, Laws of 1909, in terms creates secs. 959—30*a* to 959—30*j*, Stats., inclusive. By such creation they are made a part of sec. 959—30, Stats. (Supp. 1906), being addenda thereto. The legislative intent is clear that ch. 539 was meant to become part and parcel of the subject of "Street Improvements" dealt with in secs. 959—30 to 959—34, Stats. These sections as they now stand include the new sections created. The language of sec. 959—30 (Supp. 1906) is broad in its scope and provides generally that whenever in any city the repaving of any avenue with a permanent paving having concrete foundation shall have been duly authorized, the board of public works may determine that any owner of a lot that is asssessed may have the option to apply for an extension. It would be a forced construction to hold that the legislature did not intend the provisions of this section to apply to an improvement made under ch. 539, Laws of 1909, when such chapter was in terms embodied into the statute of which

sec. 959—30 is a part. We are satisfied such was not the legislative intent, and conclude that the board of public works properly held the section applicable to street improvements made under ch. 539 of the Laws of 1909.

The answer to the second question presented is not so clear. There is much force in the argument that the city had in nowise changed its relation to the subject matter when the withdrawals were attempted to be made. The contractor was not interested in the question of the right of withdrawal, for he had assumed the contract with the express proviso that any or all of the lotowners might extend the time of payment. If they did so extend, he received the bonds; if not, the cash when collected. He had agreed to take either. So it narrows down to a question between the city and the lotowner. The trial court found that plaintiffs did not, at the time they made application for an extension, know that their property had paid its full share of street improvements for paving, and they made prompt efforts to withdraw their application as soon as they learned the true facts. The remedy by appeal being exclusive, the court will grant either equitable or legal relief, or both, as each case may require. And ordinarily equity will relieve against a mere mistake of fact where no laches is shown and the other party has not materially changed his position relative to the subject matter. We have here, however, a case where a city is engaged in making important street improvements, in which many proceedings must be timely had by it. The statute (sec. 959—31) gives the option to the property owner to have the time of the payment of his assessment extended upon the express condition, to be embodied in his application as an agreement, that "in consideration of the privilege granted by such resolution [of extension] the applicant will make no objection to any want of power, illegality or irregularity in regard to the assessment against his property." It was within the province of the legislature to grant or withhold the privilege of such an option.

Weise v. Green Bay, 143 Wis. 198, 126 N. W. 681. That being so, it could attach such conditions to the exercise thereof by the lotowner as it deemed proper. No doubt the legislature considered that when it gave lotowners a period of thirty days in which to determine whether or not they would apply for an extension, it gave them ample time to inquire into the regularity of the proceedings and to ascertain whether or not their property was subject to the assessment. Having given adequate time for such investigation, it no doubt also considered that it was reasonable to require them to waive all want of power and any irregularity or illegality as a condition precedent to their enjoying the right of an extension. No lack of knowledge of such waiver can be claimed, for it is expressly embodied in the signed application. So each lotowner was put to the election of accepting the benefits of an extension and waiving all want of power to make the assessment, or any irregularity therein, or to reject the privilege of extension and retain the right to question both the power to assess and the regularity or legality of the assessment. The privilege granted upon such conditions must be deemed analogous to the right of an election between inconsistent remedies, which when once exercised cannot be withdrawn or changed. True, the city in the instant case may not have materially altered its situation relative to the subject matter between the time of the making of the application and the attempted withdrawal thereof. But were it held that such application, once made, could be withdrawn, it would seriously hamper cities in the subsequent steps to be taken, for they could never know on what property to issue bonds if the applications were subject to withdrawal.

But it is said the city took no action upon the applications before the requests for withdrawal were made. No action by the city was necessary. It had no power to accept or reject the applications at its own pleasure. It had to accept. When properly made, the applications became contracts or agree-

ments between the lotowners and the city by force of the statute. The city could determine whether or not it would permit extensions at all. But having determined that it would, it was bound to accept all applications that were legally made. It could exercise no discretion as to that, and hence no action on its part to show an acceptance of the applications was necessary. Nothing remained for it to do but to issue bonds on all lots covered by applications made in accordance with the statute.

It is deemed that the privilege of extension is an adequate consideration for the waiver required by the statute, and it expressly makes such privilege the consideration, for it says: "In consideration of the privilege granted by such resolution the applicant will make no objection," etc. The doctrine of estoppel, therefore, is not applicable to the case. The express waiver provided for by statute controls. A waiver has properly been defined to be "the intentional relinquishment of a known right." *Monroe W. W. Co. v. Monroe,* 110 Wis. 11, 85 N. W. 685; *Swedish Am. Nat. Bank v. Koebernick,* 136 Wis. 473, 479, 117 N. W. 1020. When the plaintiffs presented their applications to the city for an extension they intentionally and voluntarily relinquished the known right to contest the validity of the assessment either because of want of power to make it or because of any irregularity or illegality therein, after having been given a reasonable time in which to investigate their rights relative thereto and ascertain what the facts were upon which they might in whole or in part defeat the assessment. It is true they did not at that time know the facts relative to their ability to successfully contest the assessment, but they did know they had a right to contest it, and they did know that they waived such right by applying for an extension. So they intentionally relinquished a known right, though in ignorance of the *quantum* of proof they could produce to sustain it. They cannot now, however, successfully plead their failure to investigate and

discover the true facts relative to the liability of their property to pay the assessment before making the waiver, because they should have made such investigation within the thirty days given them by the law for that purpose. Not having made it then, they are bound by the election made. The result is the case must be affirmed on both appeals.

By the Court.—Judgment affirmed.

BARNES, J. (*dissenting*). I think the judgment should be reversed on the appeal of the plaintiffs *Sakrison, Grant,* and *Landgren.* I am unable to convince myself that they received any consideration for signing the request which they made. Before signing they owed the city nothing presently or prospectively and were under no obligation to pay any part of the unlawful assessment. It would seem that the only consideration which they received was in the shape of a good-sized obligation to pay something which they neither owed nor should be called upon to pay. This does not comport with my idea of a consideration. To be sure, the latter might consist of a detriment or loss to the city, but the city is wholly unable to show where it is any worse off in a single particular because of the request. The request was made in ignorance of the fact that the property of the plaintiffs was exempt from the special assessment made, and was promptly withdrawn when discovered. It seems to me that to make a party the victim of an innocent and excusable mistake which has harmed no one, and to compel him to pay a very considerable sum of money which he did not owe, because of it, to one who is admittedly neither legally nor equitably entitled thereto and whose only right is based on the fact that a mistake was made, is a rather harsh rule. It is proper enough to hold parties responsible for their mistakes when others have thereby been misled to their detriment. But I do not think we should be so intolerant of them as to permit others to be enriched because of them, where they were wholly unaffected by what was mistakenly done.

Neither do I think that there is any analogy between the doctrine of election of remedies and the situation in the present case. The matter of election as to which of two or more inconsistent remedies will be pursued presupposes that the different remedies exist. Here, under the supposition on their part that they were obliged to pay the assessment in a lump sum if they did not request that it be extended over a series of years, plaintiffs chose the latter alternative. They elected to pay what they supposed was a debt in instalments instead of in a lump sum. Inasmuch as they owed nothing, it would be hardly fair to say that they elected to make a donation.

LOOMIS, Appellant, vs. BESSE, Respondent.

February 21—March 12, 1912.

Animals: Trespass: Altering colt: Measure of damages: Evidence: Experts: Instructions to jury: Costs: Separate judgments for defendants.

1. To prove that a colt not in fact registered was entitled to registry, the records upon which a certificate of registry would be based should be offered, and parol testimony is not admissible.
2. In an action to recover damages for unauthorized castration of a colt, the measure of damages is the difference between the value of the colt immediately before and its value immediately after the operation.
3. Refusal to permit a witness to testify as to such values was not error where he admitted that he was not familiar with the value of horses at the place in question or in that vicinity.
4. Exclusion of testimony having only an indirect or remote bearing on the question of value was not error.
5. An instruction that the jury should assess as damages the difference between the *reasonable* market value of the colt before and after the operation, was not error.
6. The action being for trespass on the colt, not for trespass on plaintiff's land, and plaintiff having recovered only six cents damages against one of the two defendants, that defendant was entitled to recover costs, under subd. 5, sec. 2918, and sec. 2920, Stats. (1898).

7. The two defendants having appeared by separate attorneys and answered separately, raising separate issues, the defendant against whom there was no recovery and who had judgment in his favor was also entitled to costs.
8. But one final judgment should be entered in an action. Where, however, two defendants are entitled to a judgment in their favor, entry of a judgment in favor of one, ignoring the rights of the other, is a mere irregularity, and such judgment will not be reversed on an appeal by the plaintiff.

APPEAL from a judgment of the circuit court for Washburn county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

On June 7, 1909, C. A. L. Loomis was the owner of a two-year-old stallion which was on a farm then rented by the plaintiff, *W. H. Loomis.* The plaintiff also owned a male colt which was being kept in the same pasture, as were several other colts and horses. On the day in question C. A. L. Loomis met the defendant *Besse,* who was a veterinary surgeon, at the village of Barronett and informed him that he desired to have his colt castrated; that he could not accompany *Besse* to the place where the colt was, but that his son who was in Barronett would go with him. *Besse* thereafter called on the son and told him that he wanted to operate on Loomis's colt and asked him for the necessary information. The boy volunteered to accompany *Besse,* and caught a colt for him, or at least assisted in doing so, and the colt so caught was operated on. *Besse* did not know *W. H. Loomis,* and when he informed the boy that he wanted to operate on Loomis's colt, he meant the colt of C. A. L. Loomis. The boy, probably not being accustomed to hearing any one speak to him of his father as Loomis, assumed that *Besse* meant the colt owned by the plaintiff, *W. H. Loomis,* and assisted in catching such colt, and in effect pointed it out as the victim. Plaintiff naturally resented the liberties which had been taken with his colt and sued C. A. L. Loomis and *Besse* for damages in the sum of $800. The complaint alleged that the colt was a thoroughbred and intended to be nurtured for breeding pur-

poses; that it had all the earmarks of a winner in this field; that *Besse* unlawfully trespassed on plaintiff's property, and was negligent besides in not ascertaining which was the right colt before operating. As to the defendant Loomis, it was in effect alleged that he carelessly neglected to give *Besse* any information as to where the farm was, where the colt was, or how it was to be found, and that he was liable in any event for the trespass committed by his servant, *Besse*. A demurrer *ore tenus* was sustained to the complaint as to the defendant Loomis, and the case proceeded to trial as to the defendant *Besse*. The jury awarded plaintiff six cents damages, which were offset against the costs, and a judgment for costs amounting to $56.89 was entered against plaintiff by the defendant *Besse*. Thereafter the defendant Loomis proceeded to and did enter a separate judgment for costs against plaintiff. Separate appeals are taken from each judgment.

For the appellant the cause was submitted on the briefs of *A. L. Bugbee*.

L. H. Mead, for the respondent.

BARNES, J. The *faux pas* committed by defendant was the result of a tragedy of errors for which plaintiff is in no sense responsible, and against which his colt in all probability protested as vigorously as it knew how. The latter would no doubt have invoked the application of the *laissez faire* doctrine had it been able to make itself understood. Its failure to do so has changed the course of its sphere of usefulness, and instead of leading a life of comparative ease it is hopelessly condemned to lead one of toil and burden. The appellant seems to have a well grounded suspicion that blundering was contagious wherever this colt was involved and that the trial court became badly infected with the contagion. Although the trial was a short one, thirty-four errors are assigned and argued. We shall not attempt to discuss these errors in detail. They may be classified under the following heads:

(1) Exclusion of parol evidence tending to show that the colt was entitled to registry; (2) excluding the evidence of a witness on the question of damages, who, it is claimed, had shown himself competent to testify; (3) refusing to permit admittedly qualified witnesses to answer certain questions propounded to them and bearing on the question of damages; (4) permitting alleged incompetent witnesses to testify on the subject of damages; (5) error in charging the jury; (6) permitting the defendant to recover costs in excess of the damages recovered; (7) error in permitting the entry of two judgments in the action.

1. As we understand the record, the court refused to allow plaintiff to testify that his colt was entitled to registry, because such testimony was not the best evidence. There was no claim that the colt was registered in fact. If it was entitled to registry it was because the record of its pedigree was preserved in books kept by some registry association, society, or company recognized by the department of agriculture at Washington, D. C. Sec. 1494—33, Stats. (Laws of 1907, ch. 340). A certificate of registry would be the best evidence that the colt was entitled to registry. In the absence of such a certificate, if plaintiff desired to prove that the colt was so entitled, such proof should be made by offering the records on which a certificate of registry would be based.

2. The court refused to permit one Randall of Spring Valley, Minnesota, to testify to the value of the colt before and after the operation because he admitted that he was not familiar with the value of horses at Barronett and in the vicinity thereof. The ruling was technically correct.

3. The court very properly held that the damages should be proved by testimony tending to show the value of the colt immediately before and after the operation. There was no error in excluding testimony that had only an indirect or remote bearing on this question.

4. Complaint is made that some of the witnesses who tes-

tified for the defendant, and to the effect that the value of the colt was not lessened by the operation, were not shown to be competent. We think all of them were qualified to testify; some better than others, to be sure, but this difference only went to the weight of their evidence and not to its competency.

5. The court charged the jury that they should assess as damages the difference between the *reasonable* market value of the colt before and after the operation. It is argued that it was error to limit the recovery to *"reasonable"* market value. The objection is captious. Had the court used the word *"unreasonable"* instead, plaintiff would have just cause for complaint.

6. It is urged that it was error to permit the defendant *Besse* to recover taxable costs in excess of the six cents damages awarded, because there was a trespass committed on the real estate of the plaintiff. The action was not one for injury to real estate, and it does not appear that *Besse* was not rightfully on the land held by the plaintiff under lease. There is nothing to show that the defendant Loomis did not have a right to send *Besse* on the premises to castrate his colt. The trespass committed was on the plaintiff's colt, not on his land.

7. It is argued that it was error to permit the entry of two judgments and the taxation of two bills of costs against the plaintiff, and this blunder presents the only serious question in the case. The defendants appeared by separate attorneys and answered separately, and their pleadings raised separate issues, if indeed any cause of action was stated as to the defendant Loomis. The defendant *Besse* might well be held liable and his codefendant be exonerated; so there was no error in allowing each of the defendants to tax statutory costs against the plaintiff. The action comes within subd. 5 of sec. 2918, Stats. (1898), and, the recovery being less than $50, plaintiff was not entitled to costs, but the defendant *Besse* was, under sec. 2920, Stats. (1898). Loomis as a suc-

cessful party defendant was also entitled to costs under that section. *Mace v. Reed,* 89 Wis. 440, 62 N. W. 186; *Wausau B. Co. v. Plumer,* 49 Wis. 112, 4 N. W. 1072; *Harrigan v. Gilchrist,* 121 Wis. 127, 448, 99 N. W. 909; *Stephenson v. Doolittle,* 123 Wis. 36, 43, 100 N. W. 1041.

The entry of two judgments in the case, however, was error. This court has frequently held that under secs. 2882 and 2883, Stats. (1898), but one final judgment can be entered in an action. *Sellers v. Union L. Co.* 36 Wis. 398, 401; *Trustees, etc. v. Delaware Ins. Co.* 93 Wis. 57, 68, 66 N. W. 1140; *Adkins v. Loucke,* 107 Wis. 587, 593, 83 N. W. 934. Other cases might be cited to the same proposition. The *Besse* judgment was entered April 29, 1911, and the Loomis judgment June 17, 1911. *Besse* had a right to enter judgment in the action when he did, although his judgment should have made provision for adjudicating the rights of Loomis if the latter so desired. Loomis, however, was not obliged to enter judgment, unless he wanted to do so. Having deferred doing so until one judgment had been entered, he should have moved to amend that judgment instead of entering a second one. The entry of a judgment by *Besse* which ignored the rights of his codefendant was at most a mere irregularity which did not constitute reversible error. The status of the Loomis judgment will be considered in discussing the appeal taken therefrom.

By the Court.—The judgment of the circuit court is affirmed.

VINJE, J., took no part.

LOOMIS, Appellant, vs. LOOMIS, Respondent.

February 21—March 12, 1912.

Separate judgments in one action: Appeal: Immaterial errors.

One of two defendants who were entitled to a judgment in their favor had a judgment entered in his favor, ignoring the rights of the other, and a separate judgment was afterwards entered in favor of the other. Upon appeal the latter judgment is affirmed, this court being equally divided upon the question whether the error in entering such second judgment was one affecting the substantial rights of the plaintiff.

APPEAL from a judgment of the circuit court for Washburn county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the briefs of *A. L. Bugbee,* and for the respondent on the brief of *W. N. Fuller.*

BARNES, J. The facts pertaining to the appeal are fully stated in *Loomis v. Besse,* decided herewith (*ante,* p. 647). Whether or not the complaint stated a cause of action against the above named defendant is now wholly immaterial. The plaintiff sought to recover damages against the two defendants for a single wrong. A jury has passed upon that issue in the *Besse Case* and has awarded plaintiff what it deemed to be full compensation for that wrong. That judgment has been paid by offsetting the nominal damages recovered against the costs awarded to Besse. Plaintiff apparently made no objection to such offset. Manifestly, the plaintiff's cause of action is thereby extinguished, and no further right of action exists against the defendant *Loomis.* Cooley, Torts (3d ed.) 233 *et seq.,* and cases cited in note 71, p. 233, note 78, p. 234, and note 79, p. 235. So it is a moot question whether or not the complaint states a cause of action against *Loomis.* Plaintiff, however, insists that there was no warrant in law for the

entry of this second judgment and that therefore it must be reversed.

Justice VINJE was disqualified from sitting in this case. The Chief Justice, Justice MARSHALL, and the writer are of the opinion that the fact that the *Loomis* judgment was entered separately is an error in procedure which does not affect the substantial rights of the party seeking to reverse the judgment, and that therefore the error should be regarded as immaterial under sec. 3072*m*, Stats. (Laws of 1909, ch. 192). Justices SIEBECKER, KERWIN, and TIMLIN are of the opinion that the failure to conform to statutory provisions such as those contained in secs. 2882 and 2883, Stats. (1898), cannot be considered an immaterial error, and that as to an error such as that complained of sec. 3072*m* has no application; and furthermore, that the substantial rights of the appellant were injuriously affected by the second judgment because it necessitated incurring the extra expense of taking two appeals instead of one, which would be wholly lost if the judgment were affirmed. This judgment must therefore be affirmed *ex necessitate* and without any discussion save a bare statement of the lines of reasoning which led to the division indicated.

By the Court.—Judgment affirmed.

VINJE, J., took no part.

ENNIS, Respondent, vs. M. A. HANNA DOCK COMPANY, Appellant.

February 22—March 12, 1912.

Master and servant: Negligence: Unsafe working place: Falling into open pit at night: Diversion of attention: Contributory negligence.

1. **In an action by a servant for injuries received by falling into an open pit on defendant's coal dock, the evidence is *held* to sustain findings by the jury to the effect that the injury was proximately caused by negligence of defendant's superintendent in sending plaintiff, on a dark night, to discover whether any one was stealing coal on the dock, the pit being unknown to plaintiff, but actually or constructively known to defendant, and so located that in executing the order plaintiff was liable to fall into it; and that plaintiff was free from contributory negligence.**
2. **Sometimes a person is bound to think with reference to where he is about to place his feet, but generally speaking one's attention may be diverted, even by small circumstances, so as to render him excusable by the standard of ordinary care for stepping into a hole or colliding with an obstruction which attention would readily disclose, and even with which he is perfectly familiar.**

APPEAL from a judgment of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Affirmed.*

Action to recover for a personal injury. The pleadings and evidence presented the question of whether defendant was actionably negligent in sending plaintiff, its servant, on a dark night to a point on its dock to discover whether there was any one there stealing coal, there being an open pit, which was unknown to him, but actually or constructively known to defendant, so located that, in executing the order, he was liable to fall into it and be injured.

There was evidence tending to prove that January 9, 1911, the day of the injury, plaintiff had been serving defendant as

a watchman on its coal dock in Superior, Wisconsin, for some two days, but had not, during that time, been in the particular region, nor did he know of the obstructions there. Defendant's superintendent suspected that some one or more persons under cover of darkness had been in the habit of going upon the dock and stealing coal. On the particular evening he thought he heard thieves at their work and directed plaintiff to go to a designated point on the dock by a particular way and endeavor to capture them. The instructions were so given that plaintiff supposed, and had a right to, that he was to go quickly and in a manner best calculated to make his expedition efficient. There was a way which was customarily used by teams in which plaintiff could have safely traveled substantially to the place to which he was directed by keeping inside the traveled track. It was so dark and the conditions were such that he was liable to wander outside such way and come in contact with the hole while hurrying to get to the particular point.

There had been a fire on the dock the previous fall and, in clearing up after it, a large amount of wreckage was strewn about the cleared part of the dock. This wreckage and some standing cars and piles of lumber were in the course plaintiff was liable to go in the performance of his task. The ground and surface of the dock, not incumbered by wreckage, were covered with ice, snow, and coal dust.

Plaintiff proceeded, hurriedly, intent on the particular purpose of the expedition. In doing so he came in contact with one obstruction after another, backing off each time and taking a new start towards the objective point. He traveled in the road some of the time and some of the time outside of it. The conditions were such that he could not tell, definitely, about that without paying particular attention to the matter, which he did not do, by reason of the fact that he was, all the time, intent upon getting to the place where the disturbance was supposed to be going on.

He went as directed around a coal pile, then across a railroad track, and by some cars and, finally, endeavored to go more directly to the particular place. As he proceeded he came in contact with some obstruction from which he escaped and kept on, not having any familiarity with the conditions, but most of the time in the track used by teams.

Some of the time he got outside of it and went over timbers, but they were covered with snow and ice and coal dust so as to make nearly a level surface. In the end he got out of the track, reached the brink of the pit, which was pretty near the traveled way, and fell in. It was not readily observable because of the darkness and surroundings. He did not see it at all or know of it till he took the fatal step. At the last instant he was walking on what appeared to him to be a level surface, when a single step caused him to drop into the hole which was about six feet deep.

The cause was submitted to the jury, resulting in findings to the effect that plaintiff's injury was proximately caused by want of ordinary care on the part of defendant's superintendent and that plaintiff was free from any contributory negligence. There were further findings so that, in the whole, according to the verdict, plaintiff was entitled to judgment, which was accordingly rendered.

For the appellant there was a brief by *Hanitch & Hartley,* and oral argument by *C. J. Hartley.*

For the respondent the cause was submitted on the brief of *W. P. Crawford.*

MARSHALL, J. The appeal presents the question of whether there was evidence tending to prove that appellant did not exercise ordinary care in respect to respondent and whether there was evidence tending to establish efficient want of ordinary care on respondent's part.

The two questions mentioned may well be answered without discussing, at length, the evidence. They depend upon

whether negligence of the defendant and contributory fault of the plaintiff, or either, were reasonably inferable from evidentiary facts, which the jury doubtless found to exist, since there was room in the evidence therefor. The ultimate facts as to negligence more often than otherwise are dependable upon circumstantial rather than direct evidence. Sometimes proof of a particular fact establishes the negligence, in case of there being any, because the act of commission or omission, under the circumstances, is negligence as matter of law. Then the act being conclusively established, there is nothing for a jury to do. But where, whether there was negligence or not is dependable upon inference of fact from evidentiary circumstances, established by direct evidence, or conceded, in general, the question is for the jury. It is only where there is, obviously, no conflict in the permissible inferences from the evidence, circumstantial and direct, that the question is for the court.

A reading of the statement of facts will be sufficient to show that this is not a case of single permissible inference as to either of the suggested propositions. The most attention was paid by counsel, particularly on the oral argument, to the fact that respondent did not proceed thoughtfully as to the condition of the surface over which he was traveling and as to his surroundings, instead of permitting his attention to be so fully diverted by the purpose of his trip. But, in the judgment of the court, it is not wholly unreasonable to conclude that he acted as prudently as the majority of mankind would, ordinarily, under the same or similar circumstances,—that it was not wholly unreasonable to assume that the average person on a dark night, absorbed in the thought of reaching quickly, and without being discovered, a person engaged in wrongdoing,—as one stealing coal on a dock,—thinking as he would be quite liable to that such wrongdoer upon apprehending imminent danger of being detected would flee,—would not, probably, carefully determine at each step the condition of his pathway or pay any particular attention thereto.

Sometimes a person is bound to think with reference to where he is about to place his feet, but, generally speaking, one's attention may be diverted, even by small circumstances, so as to render him excusable by the standard of ordinary care for stepping into a hole or colliding with an obstruction which attention would readily disclose, and even with which he is perfectly familiar. *Crites v. New Richmond,* 98 Wis. 55, 73 N. W. 322; *Collins v. Janesville,* 111 Wis. 348, 356, 87 N. W. 241, 1087; *Murphy v. Herold Co.* 137 Wis. 609, 119 N. W. 294.

Without further discussion we may well close this case by saying that it is the opinion of the court that the record does not disclose any good ground for interference with the trial court's refusal to disturb the verdict, as contrary to the evidence.

By the Court.—The judgment is affirmed.

STATE EX REL. JOHNSON, Respondent, vs. NYE, Appellant.

February 22—March 12, 1912.

Constitutional law: Officers: Members of assembly: Eligibility to office whose salary is increased during their term: Grain commissioners: Appointment: Time: Directory statute: Recommendation: Incompatible offices: Vacating one by accepting other: Qualifications.

1. By ch. 440, Laws of 1909, the salary of grain commissioner was fixed at $200 per month, $100 of which was payable out of the state treasury and $100 out of the funds or fees collected "after all legal obligations, including any moneys advanced by the state, have been fully paid." By ch. 458, Laws of 1911, the same monthly stipend was made payable wholly out of the funds or fees collected, and the words above quoted were omitted. *Held,* that the salary was not thereby increased so as to render a member of the legislature of 1911 ineligible to the office of grain commissioner, under sec. 12, art. IV, Const.
2. The scope of the law in this respect cannot be broadened or varied, or an increase thereby in the emoluments of the office

be shown, by allegations in pleadings, such as, for example, an allegation that under the act of 1911 payment of the salary is more secure and certain, or that under the act of 1909 there might be times when the amount of funds or fees collected would not be sufficient to pay that part of the salary which was payable therefrom.

3. The provisions of said sec. 12, art. IV, Const., should be narrowly construed in favor of eligibility; and ineligibility should not be declared upon grounds resting in mere speculation or conjecture.
4. A statutory requirement as to the time of making an appointment to a public office is directory merely; and the governor may legally appoint a state grain commissioner in October, although by law he should have made such appointment in January preceding.
5. The provision in the statute creating a grain commission (sec. 2, ch. 19, Laws of 1905), to the effect that the governor before making an appointment thereto shall request the board of trade of the city of Superior to recommend a person for the position, is satisfied where such recommendation has been in fact made without request, even though the appointment is not made until nine months afterward.
6. The board of trade having made one recommendation for the position, no further action by the governor in that behalf was made necessary by a subsequent notice from the board of trade that if the person so recommended was not satisfactory it would like the opportunity to make another recommendation.
7. Where two offices are incompatible the acceptance of one by the incumbent of the other *ipso facto* vacates such other, at least in cases where such incumbent can vacate the first office by his own act.
8. Under secs. 961, 962, Stats. (1898), a member of the assembly can resign and the office becomes vacant by his own act; and acceptance of an incompatible office has the same effect.

[9. Whether the office of member of the assembly and that of grain commissioner are incompatible, not determined.]

10. The alleged fact that a person appointed to the office of grain commissioner is without experience to enable him to properly judge and grade grain, does not affect his right to hold the office.

APPEAL from an order of the circuit court for Douglas county: FRANK A. ROSS, Circuit Judge. *Reversed.*

This is an action of *quo warranto* brought to oust the defendant from the office of member of the grain and warehouse

commission of Wisconsin. The complaint alleges in substance:

That on the 9th day of July, 1906, to fill a vacancy then existing, the relator, *Henry A. Johnson,* was duly appointed by the governor of Wisconsin to the office of commissioner of the grain and warehouse commission for Wisconsin (hereinafter called grain commissioner) under ch. 19 of the Laws of 1905 and acts amendatory thereof and supplemental thereto, and immediately after his appointment and in pursuance thereof he duly qualified as such officer, entered upon the duties thereof, and through successive appointments thereto has continued to occupy and exercise the duties of such office from said 9th day of July, 1906, up to and including the 23d day of October, 1911; that he was last appointed to said office in the month of January, 1910, for the year ending the first Monday in February, 1911, and until his successor should be duly appointed and qualified, and that the relator has been since said 9th day of July, 1906, and now is, entitled to said office.

That during the year last past and up to and including the 23d day of October, 1911, said grain and warehouse commission for Wisconsin (hereinafter called the grain commission) was composed of the relator, *Henry A. Johnson,* William H. Crumpton, and James A. Kernan; that pursuant to sec. 1747—2, Stats. (Laws of 1905, ch. 19), the relator has received all his appointments as such grain commissioner upon recommendation of the board of trade of the city of Superior; that the said James A. Kernan was appointed and now holds his office as such grain commissioner pursuant to the recommendation of the governor of North Dakota; and that while said William H. Crumpton was not recommended by the governor of New York for the reason that owing to a spirited contest between candidates the governor of New York declined to recommend any one, yet his appointment as such grain commissioner was accredited to New York.

That in the month of October, 1911, and, as affiant is in-

formed and believes, on or about the 7th day of October, 1911, the governor of Wisconsin undertook to appoint, and in form did appoint, the defendant, *Ray J. Nye,* to said office of grain commissioner to succeed said relator, and within a few days thereafter and in October, 1911, said defendant attempted to qualify therein.

That at the biennial general election held the 8th day of November, 1910, said defendant, *Ray J. Nye,* was duly elected assemblyman from the Second assembly district of Douglas county, Wisconsin, for the ensuing two-year term; that pursuant to said election and immediately thereafter the defendant duly qualified as such assemblyman and attended and took part as a member of the legislature from said district during the entire biennial session held in 1911; that by virtue of said election and qualification he ever since said election has been and now is a member of the legislature of Wisconsin.

That in marketing, handling, and housing of grain tributary to the head of Lake Superior, the city of Superior in Wisconsin, and the city of Duluth in Minnesota, come in direct competition, and the facilities for marketing, handling, and housing grain in these two cities are very similar; that the yearly crop of grain grown in territory tributary to and which can be handled at the head of Lake Superior varies much in quantity, depending upon the favorableness of the season and other varying conditions; that in inspecting and weighing grain the grain commissioners of Wisconsin come in direct competition with the commissioners of Minnesota who possess similar duties and powers, in consequence of which it is impracticable and impossible for the grain commissioners of Wisconsin to exact, charge, or collect fees for inspecting and weighing grain which are substantially in excess of the fees charged by the Minnesota commission; that such competition is keen and has at times threatened to greatly reduce the amount of fees which can be collected under ch. 19 of the

Laws of 1905 and amendments thereto; that owing to all these conditions there have been times, and the relator verily believes there will be times in the future, when the amount of fees which can be collected by said grain commission of Wisconsin was not, and will not be, sufficient to meet all the obligations of said grain commission; that in June, 1911, the time ch. 458, Laws of 1911, was enacted, there was a lack of funds in the treasury to meet the obligations of the grain commission, and there was no money out of which the second hundred dollars of the grain commissioners' monthly salaries (being that part theretofore payable out of fees after all legal obligations had been paid) could be paid for the months of March, April, May, and June, 1911, and the grain commissioners had then received only $100 salary per month for the aforesaid months; but pursuant to ch. 458, Laws of 1911, $5,742.47 was transferred from the general fund to the "Wisconsin grain and warehouse commission fund," and out of the fund so transferred the salaries of the commissioners for said months were, early in July, 1911, paid in full; that said ch. 458 makes the present arrangement for payment of salary of grain commissioners surer and more remunerative than the law of payment as it stood prior to the enactment of said chapter, and under conditions that are liable to confront the commission at any time the salaries received by the commissioners will have been increased by said ch. 458.

That said defendant was in January, 1911, duly constituted and appointed chairman of the finance committee of the assembly, accepted his appointment, and ever since has been and now is chairman of said committee. On July 8, 1911, pursuant to ch. 553, Laws of 1911, the defendant, by virtue of being chairman of the finance committee of the assembly, became *ex officio* member of the state board of public affairs, and ever since said 8th day of July, 1911, has been a member of said board. At the first meeting of said board, held, as relator verily believes, in July, 1911, the defendant was ap-

pointed secretary of said board. That said defendant was at the time of his appointment as grain commissioner, ever since has been, and now is engaged in the duties of the state board of public affairs; that the office of assemblyman held by defendant, and the office of member of the state board of public affairs, held by defendant as aforesaid, are each incompatible with the office of grain commissioner.

That sec. 2 of ch. 19, Laws of 1905, in providing that before making such appointment the governor shall request the governors of North Dakota and New York, and the board of trade of Superior, respectively, to recommend a person or persons for the appointment upon such commission, was enacted with a design to prevent appointments of such grain commissioners for political motives and to secure grain commissioners who are expert grain men, and a grain commission equally poised between buyer, seller, and middleman; that the governor of Wisconsin did not before appointing said defendant grain commissioners, nor at any time, request the board of trade of Superior nor the governors of North Dakota and New York to recommend a person or persons for the appointment; that the board of trade of Superior in January, 1911, by unanimous vote of its directors, recommended that *Henry A. Johnson,* relator, be re-appointed to succeed himself; that when no appointment was made in January, 1911, the board of trade, through its president, notified the governor on or about June 24, 1911, that if for any reason *Henry A. Johnson* was unsatisfactory to him, the board of trade would like the opportunity of recommending some other person, but relator verily believes that the governor completely ignored said request and said board of trade was never given an opportunity to recommend another person; that pursuant to ch. 440, Laws of 1909, it was the duty of the governor to make the appointment of a successor to relator in January, 1911, and in conformity to the spirit of the law it was his duty to appoint a person who is an experienced judge of grain, and although de-

fendant is without experience which enables him to properly judge and grade grain, and is without the necessary qualifications to enable him to properly fill such office, the governor refused to appoint a grain commissioner in January because to subserve political ends alone he wanted to appoint defendant, but did not want to appoint him until after the legislative session had adjourned, and for that reason withheld making such appointment until October, 1911.

That because of the foregoing the defendant was at the time he was so appointed grain commissioner, ever since has been, and now is ineligible to hold said office, and the governor had no power to appoint said defendant in the manner and at the time and under the conditions he so appointed him.

That on the 23d day of October, 1911, defendant demanded of relator that he turn over the books and papers belonging to said office of grain commissioner, and that he be allowed to occupy said office; that the relator then and there told defendant that he was not entitled to said office and that he, relator, was entitled to hold said office and that he would not voluntarily surrender said office, and then and there protested against the defendant occupying said office, but that defendant then and there on said 23d day of October, 1911, without relator's consent and against his protests, unlawfully usurped said office and has ever since continuously unlawfully usurped said office, and has, since the 23d day of October, 1911, withheld and still withholds the same and the fees and emoluments thereof from relator, and on the 1st day of November, 1911, ordered the relator to leave the office rooms occupied by said grain commission.

That upon request by complainant to the attorney general to bring suit to oust said *Ray J. Nye* from said office, said attorney general refused and still refuses so to do.

Judgment was demanded that the defendant be adjudged guilty of usurping, intruding into, and unlawfully holding said office, that he be excluded therefrom and the privileges

thereof, and that the relator be entitled to have, hold, and exercise said office, and to the fees and emoluments thereof, and that the relator recover the costs of this action, and for such further and other relief as the court may deem just.

The defendant demurred to the complaint for want of facts sufficient to constitute a cause of action. From an order overruling the demurrer this appeal was taken.

W. R. Foley, for the appellant.

For the respondent the cause was submitted on the brief of *H. V. Gard.*

KERWIN, J. The questions before us arise upon demurrer to the complaint as appears from the statement of facts.

The grain and warehouse commission of Wisconsin was created by ch. 19, Laws of 1905, amended by ch. 12 of the special session of 1905, and again amended by ch. 440, Laws of 1909, and by ch. 458, Laws of 1911. It is the contention of the appellant that the complaint fails to state a cause of action, therefore that the demurrer should have been sustained. The questions involving the sufficiency of the complaint will be treated in their order.

1. It is claimed by the plaintiff that the emoluments of the office of grain commissioner were increased while defendant was a member of the assembly. The constitutional provision invoked upon this contention reads:

"No member of the legislature shall, during the term for which he was elected, be appointed or elected to any civil office in the state which shall have been created, or the emoluments of which shall have been increased, during the term for which he was elected." Sec. 12, art. IV, Const.

Under the original act, Laws of 1905, the commissioners received a salary of $100 per month, payable out of the state treasury in the same manner as other salaries were paid. In 1909 the legislature amended the law as to salaries and provided that each member should receive a salary of $200 per

month, $100 of which should be payable out of the state treasury monthly in the same manner as other salaries are paid, and making appropriation therefor; the other $100 to be paid monthly out of the funds or fees collected "after all legal obligations, including any moneys heretofore or hereafter advanced by the state, have been fully paid." Ch. 440, Laws of 1909. In June, 1911, the law was again amended so as to provide that each commissioner should receive a salary of $200 per month out of the funds or fees collected under the provisions of the act. Ch. 458, Laws of 1911.

It is argued by counsel for plaintiff that the law of 1911 increases the emoluments of the office. We fail to see how. The salary, $200 per month, remains the same, and the only change is in the manner of payment. Under the 1909 law $100 was paid out of the state treasury, and the other hundred out of the fees or funds collected; while under the law of 1911 the whole $200 is paid out of the fees or funds collected. But it is argued that the payment under the 1911 law is more secure and certain than under the 1909 law. True, under the 1909 law the $100 is paid out of fees or funds after other obligations are paid, while such a restriction on the fund does not appear in the 1911 law. But under the 1909 law the first $100 is concededly safe, and only the other hundred dollars could be jeopardized in case of lack of funds, while under the 1911 law, in case of lack of funds, the whole salary might be jeopardized, depending upon the extent of the shortage.

But no facts are pleaded showing with any degree of certainty that the law of 1911 increased the emoluments of the office, and it is obvious in the nature of things that no facts could be pleaded showing increase in emoluments by the 1911 law. The scope of the laws touching the subject cannot be broadened or varied by allegations in pleadings.

The complaint alleges that in June, 1911, there was a lack of funds in the treasury to meet the obligations of the com-

mission and pay the second $100 of the grain commissioners' salaries for the months of March, April, May, and June. But it appears the shortage was only temporary, since a fund of $5,742.47 was transferred to the grain and warehouse commission fund, the same being an amount previously paid into the general fund and representing a profit to the state over and above the necessary expense of the commission, and out of this fund the salaries for March, April, May, and June were paid in full. The defendant received no benefit from this fund. True, the complaint alleges that relator *verily believes* that there will be times in the future when the amount of fees that can be collected will not be sufficient to meet all the obligations of the grain commission. This allegation is not even upon information and belief, only upon belief. Plaintiff further relies upon the allegations of the complaint to the effect that ch. 458 of the Laws of 1911 makes the present arrangement for payment of salary surer, preferable, and more remunerative than the prior law. These are conclusions not warranted by the law, and of course cannot change or modify the scope or purpose of the law. The demurrer admits only facts well pleaded, not conclusions. No change was made in amount of salary or time of payment in 1911; there was no increase of emoluments of the office in 1911.

Contention is made that under the law as it stood prior to 1911 a situation might arise and conditions be such that there would not be money enough to pay the $100 payable out of fees or funds. A similar conjecture might be indulged as to lack of funds to pay out of fees or funds under the law of 1911 and even the $100 secured by the law of 1909 lost. This line of argument involves mere speculation and conjecture. The constitutional provision under consideration should be narrowly construed in favor of eligibility. *State ex rel. Ryan v. Boyd,* 21 Wis. 209; 29 Cyc. 1381, 1383, 1427;

U. S. v. Langston, 118 U. S. 389, 6 Sup. Ct. 1185; *Riggs v. Brewer,* 64 Ala. 282.

We think under the law and the allegations of the complaint it cannot be said that the emoluments of the office were increased in 1911.

2. It is further contended that the appointment was void because not made in January, 1911. Ch. 440, Laws of 1909, provides:

"The commissioners heretofore appointed under this act shall hold their offices until the first Monday in February, 1910, and until their successors are appointed and qualified. On or before the first Monday in February, 1910, the governor shall appoint three commissioners; the term of one such appointee shall terminate on the first Monday in February, 1911; the term of the second such appointee shall terminate on the first Monday in February, 1912; and the term of the third such appointee shall terminate on the first Monday in February, 1913. In January, 1911, and annually thereafter there shall be appointed in the same manner one commissioner for the term of three years from the first Monday in February of such year. Each commissioner so appointed shall hold his office until his successor is appointed and qualified. And in case of any vacancy in such commission, the governor shall fill the vacancy for the unexpired term so made vacant in the manner as original appointments are required to be made."

Counsel cites Mechem on Public Officers and from courts other than Wisconsin on this point, but we think the decisions of this court settle the contention against the plaintiff.

It is true, as appears from the complaint, that the defendant was not appointed in January, nor until October, 1911. But under the decisions of this court we think the statute is directory, not mandatory, and that the appointment made after January is a valid appointment. *State ex rel. Cothren v. Lean,* 9 Wis. 279; *Application of Clark,* 135 Wis. 437, 115 N. W. 387.

It is also insisted under this head that the appointment was

void because no request was made to the board of trade for recommendation. But the request was waived because recommendation had been made without it. The recommendation having been made by the board of trade without request by the governor, such request was dispensed with. Nor is it material that a long time elapsed after the recommendation before the appointment was made. The board having made one recommendation, although without request from the governor, the law providing for request was satisfied, and no further action by the governor in that behalf was necessary, notwithstanding that the board did in June notify the governor that if the relator, whom the board recommended, was not satisfactory, it would like an opportunity to make another recommendation.

3. It is also claimed that the offices of member of assembly and grain commissioner are incompatible. Without determining whether they are incompatible or not, it is sufficient to say that under well established principles of law the acceptance of the latter office, if the offices are incompatible, vacated the former. *State v. Jones,* 130 Wis. 572, 110 N. W. 431; 29 Cyc. 1382 and cases cited; Throop, Public Officers, §§ 30–40; Mechem, Public Officers, §§ 422–424.

Counsel for respondent, however, makes some claim that the defendant could not of his own free will vacate his first office by the acceptance of a second, citing Mechem on Public Officers, §§ 419–421.

Sec. 419 of Mechem on Public Officers states the general proposition that it is contrary to the policy of the law that the same individual should undertake to perform inconsistent and incompatible duties, and sec. 420 lays down the rule that, where the offices are incompatible, the acceptance of the latter *ipso facto* absolutely vacates the former and terminates the title of the incumbent thereto without any other act or proceeding. And sec. 421 simply makes the exception to the general rule in cases where the officer cannot vacate the first

office by his own act. It is clear that the instant case does not come within this exception.

Our statute, secs. 961 and 962, confers upon such officers the right to resign. Sec. 961 provides how resignation shall be made, and only requires the action of the officer, and sec. 962 provides that every office shall become vacant by resignation. So in the instant case the defendant had the absolute right to resign, therefore his acceptance of the office of grain commissioner, assuming that it was incompatible with the office of member of assembly, absolutely vacated the office of member of assembly.

Point is also made that the defendant was ineligible because of lack of personal qualifications. It is alleged in the complaint that it was the duty of the governor to appoint a person who is an experienced judge of grain; that defendant is without such experience which enables him to properly judge and grade grain and is without the necessary qualifications to enable him to properly fill the office. We think this contention is without merit and shall spend no time in discussing it.

It follows, therefore, that the complaint fails to state a cause of action, and that the demurrer thereto should have been sustained.

By the Court.—The order overruling the demurrer is reversed, and the cause remanded with instructions to the court below to sustain the demurrer to the complaint.

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3. Since the enactment of ch. 353, Laws of 1907, a cause of action for deceit survives the death of the party originally liable. *Ibid.*
4. An application to revive an action for deceit was properly denied where it appeared that, upon the trial of a previous action for substantially the same cause, plaintiffs' counsel admitted that the matters complained of had been settled by acts of the parties before suit, but was allowed to discontinue the action without prejudice, against defendants' objection; that the subsequent action was not commenced until the alleged cause was nearly six years old; that plaintiffs delayed closing the first suit by judgment, and defendants had been put to great expense and forced to take two appeals to the supreme court to secure a proper judgment therein; and that in the interval the relations of the parties had changed and several had died. *Ibid.*

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9. Upon an appeal in a matter wherein the trial court failed to exercise its discretion because of an erroneous view of the law, the decision will be affirmed if right, however untenable the ground upon which it was rendered. *Harris v. Welch,* 441

10. To justify an affirmance in such case it is not necessary to determine that a contrary decision by the trial court would have been an abuse of discretion. If the right of the matter is clear, this court will act upon the preponderating probability

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11. A judgment,—right on facts found expressly or inferentially, or clearly established by competent evidence or evidence not excepted to, though not found at all or the facts pleaded,—will not be disturbed on appeal, since the real right is the end sought,—that appearing satisfactorily, it will prevail however irregularly or illogically, so long as not prejudicially, embodied in the judgment. *Estate of Koch,* 548

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3. The presumption of liability in such cases does not rest upon the fact of opportunity to inspect the goods when received, but upon the necessities of the situation; hence the carrier is not relieved because the goods were shipped in bond under the customs seals of the United States government. *Ibid.*
4. The presumption which is applicable to the last of several connecting carriers is equally applicable to any intermediate carrier who is shown to have delivered the goods to a succeeding carrier in a damaged condition. *Ibid.*
5. Where the last of several connecting carriers merely switched the goods, packed in cases, over its road a distance of about one mile on a clear day, and the next preceding carrier transported them by both land and water and had them in its possession for six days, and the goods when delivered to the consignee were wet and mildewed, a *prima facie* case of liability was established against such next preceding carrier. *Ibid.*

Carriers of passengers: Personal injuries: Anticipation of negligent act of passenger. See RAILROADS, 1–7, 13–16.

6. Common carriers are not responsible for the lawless acts of persons not under their control, which they could not reasonably anticipate. *Sure v. Milwaukee E. R. & L. Co.* 1

7. A carrier is not bound to anticipate that a passenger will intentionally meddle or interfere with the machinery of the car or train, and is not liable for injury to another passenger from such act, in the absence of any other ground of negligence. So *held*, where a boy, who was a passenger on a street car, deliberately and without authority released a brake, which was properly set, causing the handle thereof to swing rapidly around and to strike and injure another passenger. *Ibid.*

Same: Baggage. See RAILROADS, 17–20.

CERTIORARI. See SCHOOLS AND SCHOOL DISTRICTS.

CHANGE OF VENUE. See VENUE.

CHARTER. See CORPORATIONS, 1, 2. MUNICIPAL CORPORATIONS, 2, 6, 16–18, 32.

CIRCUIT COURTS. See COURTS, 1–8, 23, 24. HABEAS CORPUS, 2.

CITIES. See DAMAGES, 7. MUNICIPAL CORPORATIONS. PUBLIC UTILITIES, 1, 4, 8, 12, 13, 17–22. TRIAL, 4.

CLAIMS. See CURTESY, 1. EXECUTORS AND ADMINISTRATORS.

CLASSIFICATION. See TAXATION, 9–11, 13, 16.

COMPENSATION. See CONSTITUTIONAL LAW, 3, 5–10. CORPORATIONS, 1, 2. COUNTIES, 1–3. EMINENT DOMAIN, 2, 3. NAVIGABLE WATERS, 8. OFFICERS, 11, 12. REGISTER OF DEEDS.

COMPETENCY. See EVIDENCE, 2–4. MASTER AND SERVANT, 1–3, 15, 16. WATERS AND WATERCOURSES, 1.

COMPLAINT. See CONTRACTS, 1, 4. CONVERSION. INJUNCTION, 1, 2. MINES AND MINERALS. MUNICIPAL CORPORATIONS, 12. NEGLIGENCE, 6. PLEADING, 1–4. RAILROADS, 8. TOWNS, 2, 3.

CONDEMNATION. See EMINENT DOMAIN.

CONDITIONS PRECEDENT. See PLEADING, 7.

CONFISCATION. See CONSTITUTIONAL LAW, 5–10. CORPORATIONS, 2.

CONNECTING CARRIERS. See CARRIERS, 1–5.

CONSIDERATION. See CONTRACTS, 1–4. MUNICIPAL CORPORATIONS, 27.

CONSPIRACY. See APPEAL, 5.

CONSTITUTIONAL LAW.

Legislative powers. See CORPORATIONS, 1, 2. COURTS, 21. MUNICIPAL CORPORATIONS, 22. NAVIGABLE WATERS, 1. TAXATION, 1–19.

1. The legislature cannot conclusively declare property existing at the time the statute goes into effect a public nuisance and penalize the use and enjoyment thereof. *Water Power Cases,* 124

2. The legislature has no power to conclusively declare that a given use of property is a public use. *Ibid.*

3. The matters covered by the two preceding paragraphs present judicial questions, for otherwise the legislature could confiscate property without making compensation. *Ibid.*

4. In order for part of an act to be upheld as separable it is essential that such part found to be within the constitutional power of the legislature forms, independently of the invalid portions, a complete law in some reasonable aspect so that it may fairly be concluded that the legislature would have enacted the same without the invalid portion. Where a legislative enactment has an all-pervading purpose coupled with minor details and administrative features and this purpose is unconstitutional, such minor details and administrative features cannot survive condemnation of the main purpose. *Ibid.*

Same: Delegation of legislative power. See TAXATION, 8.

Same: Taking private property: Just compensation. See CONSTITUTIONAL LAW, 3. CORPORATIONS, 1, 2. NAVIGABLE WATERS, 8.

5. The act in question (ch. 652, Laws of 1911), by declaring the property a public nuisance, providing for its abatement, and penalizing its use conditionally; and without any physical change in the property or its condition recognizing it as a lawful structure in aid of navigation, and allowing it to remain on condition that some other person apply for it or that the owner relinquish valuable property rights without compensation and make certain payments to the state, operates to deprive such owner of his property without due process of law, unless just compensation to such owner is provided. *Water Power Cases*, 124

6. The just compensation required by the constitution is not provided by permitting compensation only if some one at some indefinite time after the taking shall appear and want the property in question. *Ibid.*

7. The just compensation required by the constitution is not provided by a statute limiting the compensation to be awarded so as to exclude all increase in value of the property after a given date long prior to the taking. *Ibid.*

8. Neither is such compensation provided where a riparian owner, having no dam or charter for a dam, is for a taking of the bank not allowed the full value of his riparian rights, including the use of water for power purposes and the advantage which the land presents for creating a water power by construction of a dam; nor is such compensation provided where a riparian owner who has lawfully constructed a dam and owns the resulting water power, but whose charter to maintain the dam is repealed, is not allowed to recover the value of his water power thus improved and in that condition. *Ibid.*

9. To declare property a public nuisance, provide for its abatement, and penalize its use without making compensation, but at the same time permitting the owner to obviate these consequences by applying for and obtaining a franchise under which he must consent that his hitherto private property be impressed with a public use, that after a stated interval some other person may take the property for a private use, that the state or a municipality may take it for a public use, and that in the latter case he forego part of the compensation required by the constitution and pay a franchise fee to the state, is depriving such owner of his property without due process of law contrary to the federal constitution, and is invalid legislation under the state constitution as well. *Ibid.*

10. Private property taken by one who has the right to use so much thereof as may be reasonably necessary for his own purpose or purposes is taken for a private use. *Ibid.*

Same: Local self-government. See TAXATION, 7.

Classification. See TAXATION, 9–11, 13, 16.

Equal protection of laws. See TAXATION, 2–4.

Due process of law. See CONSTITUTIONAL LAW, 5, 9. CORPORATIONS, 1, 2.

Compensation of public officers. See OFFICERS, 1, 3, 11.

Taxation. See TAXATION, 1–19.

CONSTRUCTIVE FRAUD. See CONTRACTS, 13.

CONTRACTS.

Requisites and validity: Consideration. See CONTRIBUTION. CORPORATIONS, 3–5. MUNICIPAL CORPORATIONS, 11. REFORMATION OF INSTRUMENTS.

1. In an action upon a written contract whereby the defendant company gave plaintiffs the exclusive right, until January 1, 1911, to sell certain of its lands on commission, subject to the company's right to make sales of the land at not less than $10 per acre, and giving plaintiffs the right and option, at any time before January 1, 1911, to purchase all unsold lands at the uniform price of $6 per acre, the complaint, stated in the opinion, is *held*, on demurrer, to state a good cause of action. *Sixta v. Ontonagon Valley Land Co.* 186

2. Such contract is held an entirety, including the option feature, and the covenants of each party constituted a consideration for the covenants of the other. *Ibid.*

3. A contract under seal imports, presumptively at least, a sufficient consideration. *Ibid.*

4. The allegations of the complaint sufficiently show an acceptance of the option to purchase, in view of the fact that defendant refused to deal further with plaintiffs under the agreement. *Ibid.*

Same: Implied contracts. See CONTRIBUTION, 7, 10, 12.

Construction. See PLEADING, 1–3. RAILROADS, 8–11.

Performance or breach. See INSURANCE. LANDLORD AND TENANT.

5. In an action for breach of a contract guaranteeing the slate roofing on plaintiff's building against leakage caused by defective workmanship, it is *held* that there was evidence from which the jury might find, as they did, that leakage in the roof was caused by defective workmanship; and it was error, therefore, for the court to change that finding. *Stanley S. E. L. Cong. v. La Crosse S. R. & C. Co.* 261

CONTRIBUTION.

1. There is, in general, a right to contribution between cosureties, not a mere privilege to be extended or not in judicial discretion. *Estate of Koch,* 548

2. Such right anciently originated in equity but now rests upon legal as well as equitable obligation and is enforceable at law or in equity according to circumstances. *Ibid.*

3. Since such right depends upon established legal and equitable rules, given a situation within them, and a remediable right exists as matter of course. *Ibid.*

4. The right being grounded, as indicated, upon the facts being found by court or jury, the former must apply the law, vitalizing the remediable character of such right. *Ibid.*

5. The right of contribution between cosureties was given remediable character in equity with correlative rights, duties, and obligations in harmony with the rule that he who asks, must do equity,—in all constituting an entirety with natural dependable elements, fixing limitations and conditions. *Ibid.*

6. The system established as indicated in No. 5 is now as obligatory on individuals in business relations, as any rule of action prescribed by written law, and regarded as automatically incorporated into every contract of guaranty, nothing appearing to the contrary, though not mentioned in its letter, and any breach thereof falls within the field of legal or equitable remedies, or both. *Ibid.*

7. Such right, inchoate in character, exists from making the guaranty, rests in implied contract, and takes remediable character upon overpayment by one of his legal or equitable share of loss. *Ibid.*

8. Such right being a creation of contract, may be contracted away, or lost, by a surety, in whole or in part, violating some duty owing by him to his cosurety. *Ibid.*

9. A breach, by one surety, of his duty to his cosurety, causing loss to the latter, to that extent, is a legal and equitable defense in his behalf against any claim of the former for contribution. *Ibid.*

10. Inhering in a joint contract of guaranty is an implied mutual agreement that any special means of immunity from, or indemnity for, loss acquired by either surety shall be held and used, reasonably, for the common benefit of the bearers of the common burden. *Ibid.*

11. A surety having control of means, as indicated in No. 10, is a *quasi*-trustee thereof for his associates with all incidental duties. *Ibid.*

12. The right of contribution may be parted with by implied as well as by express contract, and the latter may be established circumstantially as well as by direct proof of contract stipulations. *Ibid.*

13. If a surety secures consent of his cosurety to a compromise of their joint claim against the principal obligor, without disclosing an advantage obtained in the transaction, the failure to disclose being without actual intent to defraud, he is guilty of constructive fraud, and is liable to share in some proper way the advantage with such cosurety. *Ibid.*

14. If one of several sureties, all being owners, directly or indirectly, of the business and property which is the primary security for discharging the guaranty, buys the interest in such business of a cosurety at its net value, he does not, necessarily, by that, alone, lose his right of contribution against the vendee, nor does his subsequent failure to protect the security in case of

continuing to control such primary security, constitute, necessarily, a wrong, forfeiting his right of contribution. *Ibid.*

15. A purchase in the circumstances stated in No. 14 is strongly evidentiary, though not conclusive, of an understanding that the vendee shall not, as between the two, be held liable upon the guaranty. *Ibid.*

16. In such circumstances, if the vendee continues to control the primary means for protecting the guaranty, he owes to the vendor the duty of exercising reasonable care to that end. *Ibid.*

17. In the circumstances of No. 16, proof of loss of the primary security within such time and under such conditions as to raise an inference of negligent performance, or disregard of the cosurety duty, there being no explanation thereof, shows, *prima facie*, fatal negligence, forfeiting the right of contribution. *Ibid.*

18. If A. and B. are substantially owners of all stock of a corporation, and joint sureties on a guaranty of its indebtedness, or part thereof, and A. buys B.'s stock, under such circumstances as to suggest a mutual understanding of there being a substantial excess of assets over general and stock liabilities, giving or contracting to give, pursuant thereto, full value for the stock, and A. thereafter controls the corporate assets, and, shortly, such assets are found not nearly sufficient to pay the general indebtedness, and there is no satisfactory explanation thereof, the presumption arises that he is guilty of having, through negligence or fraud, breached his duty to the corporation and his cosurety, which is fatal to any claim in his behalf against B. for contribution on account of payment of the guaranteed indebtedness. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See INSTRUCTIONS TO JURY, 8, 10. MASTER AND SERVANT, 11, 19–24. MUNICIPAL CORPORATIONS, 34. NEGLIGENCE, 5. RAILROADS, 4. STREET RAILWAYS, 5, 6. TRIAL, 21.

CONVERSION.

1. A complaint stating that one of the plaintiffs was owner in possession and the others were mortgagees of a stated quantity of timber and lumber of a specified value, cut from described lands, and that the defendant unlawfully took and converted the said property and all of it to his own use, to the damage of plaintiffs in a certain sum, states a good cause of action. *Junek v. Buzzelli*, 610

2. Where the answer in such case justifies the taking and conversion by virtue of a bill of sale from one of the plaintiffs and another person to defendant as security for an accommodation note executed by the latter at the request of one of the plaintiffs, such affirmative defense of justification is deemed at issue without reply; and plaintiffs may show in avoidance of such bill of sale that part payment and substituted security in part were given to defendant, in consideration of which, prior to the alleged taking and conversion, he orally released the chattel mortgage created by said bill of sale. *Ibid.*

3. It is not necessary in such a case that the holder of the accommodation note consent to the release of the chattel mortgage. *Ibid.*

CORPORATIONS.

Charters: Amendment and repeal. See PUBLIC UTILITIES, 14–16.

1. The reserved power of repeal of charters contained in the constitution or in a charter must be construed so as to harmonize it with other commands and restrictions contained in the constitution, and it does not authorize the taking without compensation of the physical property acquired under said charter. This reserved power of repeal is also subject and subordinate to the provisions of the federal constitution which forbid the state to deprive any person of life, liberty, or property without due process of law and to the substantial equivalent of the latter contained in the state constitution. *Water Power Cases,* 124

2. Where a charter reserving therein no right of repeal is granted to a natural person, authorizing the construction of a dam in a navigable river in aid of navigation and accepted by such grantee by construction of the required dam, the charter is not repealable at the pleasure of the legislature; but before acceptance it is so repealable. When such charter is granted to a natural person, reserving to the state a right of repeal, or where it is granted to a corporation, and in either case accepted by construction of the required improvement, while there exists the power of repeal this does not include confiscation or destruction of any property which can exist notwithstanding the repeal, but all such property is protected by the usual constitutional guaranties applicable to other property. *Ibid.*

Corporate powers. See PUBLIC UTILITIES, 14–16.

Contracts.

3. Where the president of defendant corporation conducted all the negotiations which resulted in the transfer by plaintiff to the corporation of personal property at the price of $5,000, to be paid in stock of the corporation, and the engagement of plaintiff at a salary so long as his services should be satisfactory, with a further agreement to buy back his stock at par in case of his being discharged, the defendant, which approved such agreement and accepted and ratified the fruits of the negotiations, thereby ratified the acts of its president; and it, not the president personally, was bound by such agreement to repurchase the stock. *Strait v. Northwestern S. & I. Works,* 254

4. After defendant had agreed to the price and salary named by plaintiff, the latter wired "Will accept and do my best, with the understanding you take my stock at par in case you wish me to retire," to which defendant replied, "Consider deal closed." *Held,* that this constituted a binding agreement to take plaintiff's stock off his hands at par in case of his discharge from defendant's employ. *Ibid.*

5. Plaintiff having by letter offered to return the stock and demanded his money, and having afterwards, before suit, tendered the certificates of stock properly indorsed, which offer and tender were refused, his acts were the equivalent of actual delivery and entitled him to treat the contract as performed on his part and to sue for and recover the face of the certificates. *Ibid.*

COSTS.

See EMINENT DOMAIN, 4, 5. NEW TRIAL, 2.

1. In an action for trespass upon plaintiff's colt, not for trespass on land, the plaintiff having recovered only six cents damages against one of the two defendants, that defendant was entitled to recover costs, under subd. 5, sec. 2918, and sec. 2920, Stats. (1898). *Loomis v. Besse*, 647
2. The two defendants having appeared by separate attorneys and answered separately, raising separate issues, the defendant against whom there was no recovery and who had judgment in his favor was also entitled to costs. *Ibid.*

COSURETIES. See CONTRIBUTION.

COUNTERCLAIM. See PLEADING, 5–7.

COUNTIES.

County board. See COURTS, 1, 2, 5, 7.

Same: Resolutions: Changing method of compensating officers: Construction. See REGISTER OF DEEDS.

1. In construing a resolution of a county board changing the method of compensation of the register of deeds from the fee to a salary system, it will be presumed the board acted in good faith and intended to accomplish a lawful result, and if the language employed is susceptible of two meanings, only one of which will give validity to the resolution, that one will be adopted. *Burgess v. Dane County*, 427
2. Under ch. 410, Laws of 1901 (sec. 764*b*, Stats.), a county board has no power to provide for a temporary change in the method of compensating the register of deeds, and if a lawful change is once effected it is permanent. *Ibid.*
3. The power given by that statute to place the office of register of deeds upon a salary basis may lawfully be exercised by the county board at an adjourned meeting. *Ibid.*
4. The resolutions of minor deliberative bodies, such as county boards, should receive a liberal construction to effectuate their evident intent. *Ibid.*
5. If necessary to harmonize the language used with the evident intent and purpose of such a resolution and to effect a valid result, its phrases may be transposed. *Ibid.*

Claims. See VENUE, 2–4.

Support of insane. See INSANE PERSONS.

COUNTY ASYLUMS. See INSANE PERSONS.

COUNTY BOARD. See COUNTIES. COURTS, 1, 2, 5, 7. REGISTER OF DEEDS.

COUNTY COURTS. See APPEAL, 15. EXECUTORS AND ADMINISTRATORS. WILLS, 3.

COURT COMMISSIONERS. See HABEAS CORPUS, 2.

COURT ROOMS. See COURTS, 1–8.

COURTS.

Inherent powers: Suitable court rooms and accommodations: Injunctions.

1. In a county like Milwaukee county, quarters which the county board proposes to furnish for the circuit court are neither suitable nor convenient unless they include a jury room. *In re Court Room,* 109
2. Independent of the statutory duty of the county board to provide suitable and convenient quarters for the circuit court, there is a duty to do so under the constitution, and the discretion of the county board in respect to the selection of court rooms is not wholly beyond the control of the courts. *Ibid.*
3. A constitutional court of general jurisdiction, like the circuit court, has inherent power to protect itself against any action that would unreasonably curtail its powers or materially impair its efficiency. *Ibid.*
4. In order to preserve the full and free exercise of its judicial functions a circuit court may, in an appropriate case, make an *ex parte* order without formally instituting an action to secure the desired relief. *Ibid.*
5. Thus, where a county board threatens to remove a circuit court to unsuitable and inadequate quarters, the court may, in an *ex parte* proceeding, issue an injunctional order restraining such action by the board. *Ibid.*
6. The better practice in such a case would be to institute the proceeding by an order to show cause, together with a temporary restraining order. *Ibid.*
7. It is within the power of the court, however, to issue an injunctional order absolute in form in the first instance; but in such a case the county board has the right to be heard as to the law and the facts upon a motion to vacate or modify such order. *Ibid.*
8. Upon refusal of the circuit court to vacate such an order an appeal therefrom may be taken, it being a final order affecting a substantial right, made in a special proceeding. *Ibid.*

Supreme court: Original jurisdiction. See INJUNCTION, 3.

9. Actions against the state, brought in the supreme court by virtue of the consent of the state given in sec. 3200, Stats. (1898), are not within the purview of the decision in this case, and nothing said in the opinion is to be construed as having any bearing on that section or actions under it. *Income Tax Cases,* 456
10. The original jurisdiction of the supreme court is a jurisdiction reserved for the use of the state itself when it appears to be necessary to vindicate or protect its prerogatives or franchises or the liberties of its people: the state uses it to punish or prevent wrongs to itself or to the whole people. *Ibid.*
11. The state in such a case is always the plaintiff and the only plaintiff, whether the action be brought by the attorney general or, against his consent, on the relation of a private individual under the permission and direction of the court. The private relator is a mere incident; he brings the public injury to the attention of the court, and the court by virtue of the power

granted by the constitution commands that the suit be brought by and for the state. *Ibid.*

12. Cases falling within the following general classes have been held to be properly within the original jurisdiction of the supreme court, *i. e.* those in which (1) a citizen is wrongfully deprived of his liberty; (2) a state office has been usurped; (3) a franchise grantable only by the state has been usurped, abused, or forfeited; (4) a law regulating public-service corporations in the interests of the people is systematically disobeyed and set at naught; (5) a navigable river which the state is bound to keep open as a highway for all is obstructed or encroached upon, or a public railroad built under a charter granted by the state is about to be destroyed; (6) a state officer declines to perform a ministerial duty in the performance of which the people at large have a material interest; (7) a state officer is about to perform an official act materially affecting the interests of the people at large, which is contrary to law or imposed upon him by the terms of a law which violates constitutional provisions; (8) the situation is such, in a matter *publici juris*, that the remedy in the lower courts is entirely lacking or absolutely inadequate, and hence jurisdiction must be taken or justice will be denied. *Ibid.*

13. It is not meant by this classification that cases may not arise which will call for the exercise of the original jurisdiction, although they may not fall within either of the classes named. *Ibid.*

14. A case, although involving a question *publici juris*, will not come within the original jurisdiction if it be only local in its effect, subject only to the exception named in the eighth class above mentioned. *Ibid.*

15. A case involving a mere private interest, or one whose primary purpose is to redress a private wrong, will not be entertained. *Ibid.*

16. A case will not be dismissed, however, because there is a private interest involved with the public interest, provided the private interest be incidental merely and the vindication of the public right be the primary purpose of the action. *Ibid.*

17. An action involving a private as well as a public interest will not be dismissed merely because the private interest may drop out, provided the public and private interests be severable and the public interest still exists. *Ibid.*

18. A taxpayer's action (as that action is known in the circuit court) wherein the taxpayer himself is the actual party, representing not the whole people or the state but a comparatively limited class, is not within the original jurisdiction of the supreme court. *Ibid.*

19. The original jurisdiction may, however, properly be used at the instance and upon the relation of a private individual to stay by proper writ the expenditure of the state's funds for purposes expressly or by necessary implication forbidden by the constitution; but the action in such a case is the action of the state, not the action of the taxpaying relator. *Ibid.*

20. Where state officials are about to spend the state's money in executing an unconstitutional law, an action may, by leave of the court, be brought in the name of the state to prevent the

threatened misapplication of its funds; but the court will judge of the exigency in each case, and will endeavor to guard against the use of its original jurisdiction in trifling cases or to accomplish ulterior purposes. *Ibid.*

21. The income tax law (ch. 658, Laws of 1911) makes such a sweeping change in general taxation policy and in methods of taxation throughout the state, and the resulting confusion would be so great if, after being in operation for a year or two, it should be held invalid, that a serious question as to the constitutionality of the law is a question seriously affecting the prerogatives of the state and the liberties of the people, and justifies the exercise of the original jurisdiction of the supreme court in an action, brought for the purpose of testing the validity of the law, to restrain administrative officers from expending state moneys in executing the same. *Ibid.*

22. In such an action only those questions will be determined which may be considered as relating to the validity of the whole act, leaving for future consideration, as concrete cases may arise, the questions relating to the validity of minor provisions as to matters of detail. *Ibid.*

Circuit courts: Jurisdiction: Writs: Taxpayers' action. See HABEAS CORPUS.

23. The constitution has not given the circuit court the power to use the writ of injunction as a prerogative jurisdictional writ, as it has been given to the supreme court; hence the circuit court has not the power, in an action not brought by the attorney general but on the relation of a private individual, to use the writ for prerogative purposes. *Income Tax Cases,* 456

24. No taxpayers' action against auditing or disbursing officers of the state, to prevent them from paying moneys out of the state treasury, can be maintained in the circuit court. *Ibid.*

County courts. See APPEAL, 15. EXECUTORS AND ADMINISTRATORS. WILLS, 3.

COVENANTS. See CONTRACTS, 2. LANDLORD AND TENANT, 1–3.

CRIMINAL LAW AND PRACTICE. See RAPE.

CURTESY.

1. In this state the right of creditors of a deceased wife to have her estate subjected to the payment of her debts takes precedence over the husband's estate by the curtesy. *Schmidt v. Raymond,* 271

2. Curtesy initiate has been abrogated in this state. *Ibid.*

DAMAGES.

Grounds of compensatory damages. See MUNICIPAL CORPORATIONS, 2–10. WATERS AND WATERCOURSES, 1, 2.

Measure of damages. See ANIMALS, 2, 5. EMINENT DOMAIN, 2, 3. INSTRUCTIONS TO JURY, 6. MUNICIPAL CORPORATIONS, 4. WATERS AND WATERCOURSES.

1. Where no limit to the amount recoverable for an injury is fixed by law, the trial court should not instruct the jury that the damages, if any, must not exceed a certain amount, even though

such amount is that named in the prayer for relief. The prayer does not govern or limit the amount of recovery, and such an instruction is likely to mislead the jury. *Otto v. Milwaukee Northern R. Co.* 54

2. Recovery by a married woman for a personal injury, treated at the expense of her husband, is limited to reasonable compensation for suffering past and future, so far as discovered by the jury to a reasonable certainty. *Ibid.*

3. In an action by a married woman to recover for personal injuries, the admission of evidence indicating that a loss of earning power was a part of her loss, in the absence of careful instructions to the jury that no element of lost earning power should be included in the damages, was misleading. *Ibid.*

4. In an action for injury to land by the deposit of foreign material thereon, the measure of damages is the diminished value of the land. The cost of removing the foreign material is merely evidentiary, and might exceed or fall short of the actual loss. *Pedelty v. Wisconsin Zinc Co.* 245

Excessive damages. See NEW TRIAL, 2. WATERS AND WATERCOURSES, 3.

5. An award of $2,000 to a married woman fifty-five years of age for an ordinary fracture of the radius of the left arm near the wrist, which ran the ordinary course of such an injury to a substantial recovery in a few weeks, is reduced to $1,200. *Otto v. Milwaukee Northern R. Co.* 54

6. An award of $7,000 for injuries to a boy under seventeen years of age, resulting in the loss of one eye, impairment of the sight of the other, and disfigurement by reason of inability to wear an artificial eye, is *held* not so excessive as to warrant interference by this court. *Ruck v. Milwaukee Brewery Co.* 222

7. An award of $1,150 is *held* not excessive for fracture of a wrist caused by a fall on a defective sidewalk, it appearing that the injury was a serious one, involving long treatment and a great deal of pain, and that at the time of the trial, nineteen months after the injury, the wrist was still in bad condition. *Roy v. La Crosse,* 266

8. An award of $3,600 to a minor injured by a fall of thirty-eight feet down an elevator shaft, he having been severely hurt and there being some evidence of permanent injury, is *held,* though very liberal, not so excessive that this court should interfere. *Vogel v. Herzfeld-Phillipson Co.* 573

DAMS. See CONSTITUTIONAL LAW, 5–10. CORPORATIONS, 2. NAVIGABLE WATERS, 5–8. WATERS AND WATERCOURSES.

DECEIT. See ABATEMENT AND REVIVAL, 3, 4. APPEAL, 13.

DEEDS. See MORTGAGES.

DELEGATION OF LEGISLATIVE POWERS. See TAXATION, 8.

DELIVERY. See CORPORATIONS, 5.

DEMAND. See TOWNS, 1, 2.

DEMURRER. See CONTRACTS, 1. CONVERSION, 1. MINES AND MINERALS. MORTGAGES. PLEADING, 8–11.

DEMURRER ORE TENUS. See APPEAL, 2. PLEADING, 4, 10, 11. RAILROADS, 8.

DEPOSITIONS.

To perpetuate testimony.

1. An application under secs. 4117–4134, Stats. (1898), to perpetuate testimony, where no action is pending, is a special proceeding. *Sioux Land Co. v. Ewing,* 600
2. An order appointing a commissioner to take depositions to perpetuate testimony under secs. 4117–4134, Stats. (1898), is not a final order nor one affecting a substantial right, and is therefore not appealable. The order directing the deposition to be recorded is the final order in such proceeding. *Ibid.*

Of adverse party. See APPEAL, 1.

DIRECTION OF VERDICT. See RAILROADS, 14–16. TRIAL, 8, 9.

DIRECTORY STATUTES. See OFFICERS, 4.

DISCRETION. See APPEAL, 9, 10. CONTRIBUTION, 1. COURTS, 2. NEW TRIAL, 1. TRIAL, 2.

DISMISSAL. See ABATEMENT AND REVIVAL, 2. MASTER AND SERVANT, 4.

DIVORCE.

Division of property.

Under the evidence, stated in the opinion, *held,* that in making a division of the property the wife should have the farm and personalty, charged with the payment to the husband of $1,500, in addition to certain payments already made by her pursuant to the judgment of the court below. *Charnley v. Charnley,* 416

Custody of children. See GUARDIAN AND WARD. WILLS, 6.

DOCUMENTARY EVIDENCE. See TRIAL, 4. WILLS, 1, 2.

DOWER. See PARTIES.

DUE PROCESS OF LAW. See CONSTITUTIONAL LAW, 5, 9. CORPORATIONS, 1, 2.

EASEMENTS. See PLEADING, 1.

ELECTRIC RAILWAYS. See INSTRUCTIONS TO JURY, 7–10. NEGLIGENCE, 5. RAILROADS, 1–7. STREET RAILWAYS.

ELECTRICITY.

1. In an action for injuries sustained by a lineman in falling from a pole the evidence is *held* to sustain a finding by the jury that such fall was caused by an electric shock received from a span wire with which plaintiff accidentally came in contact. *Doyle v. La Crosse City R. Co.* 280
2. But, it appearing that there was absolutely nothing to indicate any defect in the insulation of any charged wire at the place and time in question, that the appliances were of approved pattern and material, and that all appeared to be in perfect order, and there being no evidence that defendant had failed to exercise due care in inspecting the wires and insulators, it is *held* that there was no warrant for a finding by the jury that the presence of a dangerous current of electricity in the span wire was due to negligence on the part of defendant. *Ibid.*
3. Greater care is required of persons handling so dangerous an agency as electricity than is required of those who handle mere ordinary substances, but the criterion of ordinary care is the

same: it is such care as the majority or great mass of mankind exercise under the same or similar circumstances. *Ibid.*

ELIGIBILITY. See OFFICERS, 1–10.

EMANCIPATION. See INSTRUCTIONS TO JURY, 6.

EMINENT DOMAIN.

Ownership.

1. The question of the ownership of land taken by a railway cannot be considered on appeal to this court where the evidence on that subject is not incorporated in the bill of exceptions. *Hauge v. La Crosse & S. E. R. Co.* 288; *Spellum v. La Crosse & S. E. R. Co.* 290

Compensation. See CONSTITUTIONAL LAW, 3, 5–10. CORPORATIONS, 1, 2. NAVIGABLE WATERS, 8.

2. Where land is taken for a railway the compensation to be made ordinarily consists of two elements: the value of the land actually taken and the damage to the remaining land; but if no compensation is claimed or awarded for the land actually taken the railway company cannot complain of the omission of that element. *Hauge v. La Crosse & S. E. R. Co.* 288

3. It cannot be held in such a case that there was error in permitting the jury to consider improper elements of damages, where the evidence in respect thereto was brought out by the appellant company and the instructions to the jury are not incorporated in the record. *Ibid.*

Appeal from award: Trial: Judgment.

4. Upon an appeal, under sec. 1849, Stats. (1898), from the award of commissioners in condemnation proceedings, the trial in the circuit court is a trial *de novo* to determine the landowner's damages, without reference to the amount awarded by the commissioners; the verdict supersedes the award; and judgment is to be rendered according to the rights of the parties, without considering which one took the appeal. *Spies v. Chicago & Milwaukee E. R. Co.* 35

5. Thus, where the landowner appealed from the award but withdrew the amount thereof, which the railway company had paid into court, and upon the trial the verdict was for a smaller sum, the railway company, although it had not appealed, was entitled to judgment against him for the difference between the award and the verdict and for the costs of the trial. *Ibid.*

6. The railway company does not in such a case, by failing to appeal, waive its right to insist that the verdict of the jury establishes the amount which it should be called upon to pay. *Grand Rapids v. Bogoger*, 141 Wis. 530, distinguished; *Groth v. M. N. R. Co.* 143 Wis. 537, limited. *Ibid.*

EMPLOYEES. See MASTER AND SERVANT.

EQUAL PROTECTION OF LAWS. See TAXATION, 2–4.

EQUITY.

See INJUNCTION. MUNICIPAL CORPORATIONS, 21, 30. PUBLIC UTILITIES, 24, 25. REFORMATION OF INSTRUMENTS, 1.

Equity will ordinarily relieve against a mere mistake of fact where no laches is shown and the other party has not materially

changed his position relative to the subject matter. *Dunn v. Superior*, 636

ESTOPPEL. See INSURANCE, 2-4. LANDLORD AND TENANT, 4. MUNICIPAL CORPORATIONS, 27.

EVIDENCE.

Presumptions. See BAILMENT. CARRIERS, 1-5. CONTRIBUTION, 18. WILLS, 3.

Burden of proof. See CARRIERS, 2. INSTRUCTIONS TO JURY, 2. RAILROADS, 20. SALES, 1. WILLS, 1.

Competency. See EVIDENCE, 2. MASTER AND SERVANT, 15, 16. WATERS AND WATERCOURSES, 1.

Negative testimony. See INSTRUCTIONS TO JURY, 9, 10.

Documentary evidence. See TRIAL, 4.

Same: Ancient record. See WILLS, 2.

Parol or extrinsic evidence affecting writings. See ANIMALS, 1. INTOXICATING LIQUORS, 2.

1. Neither evidence of conversations between the parties at or prior to the making of a contract, nor evidence of the facts and circumstances under which it was made, is admissible to vary or contradict their written agreement; but in case of uncertainty as to the meaning it may be read in the light of the surrounding circumstances, including the discussion and agreement or understanding at the time as to the import of a term used in the writing which is susceptible of a double meaning. *Pedelty v. Wisconsin Zinc Co.* 245

Opinion evidence: Subjects of expert testimony. See RAILROADS, 6.

2. Testimony of physicians who had made a special study of the brain and nervous system, to the effect that the continuous operation of a punch press in the usual manner is likely to produce an involuntary sequence of muscular activities which will become automatic and proceed without express brain action or will power, was within the field of expert evidence and was competent as tending to prove one material fact, namely, the existence of the danger. *Kaczmarek v. Geuder, P. & F. Co.* 46

Same: Competency of experts.

3. The owner of insured property which is destroyed, consisting of a building and other common articles of personal property, is competent to give his opinion as to the value thereof. *Allen v. C. & N. W. R. Co.* 145 Wis. 263, distinguished. *Farley v. Spring Garden Ins. Co.* 622

Weight and sufficiency. See CONTRACTS, 5. ELECTRICITY, 1, 2. INSTRUCTIONS TO JURY, 9. MASTER AND SERVANT, 2, 5, 10, 23. MINES AND MINERALS. MUNICIPAL CORPORATIONS, 1, 7. PARTNERSHIP, 1. RAPE. REFORMATION OF INSTRUMENTS, 2. SALES, 2, 3. STREET RAILWAYS, 4. WILLS, 2.

4. Testimony as to dimensions or distances which is based on memory or casual observation and is at best only an estimate must yield to that which is based on actual measurements; but the testimony of a witness who made actual measurements and remembers what they were is not to be treated as a mere estimate or to be disregarded merely because he is unable to produce the

memorandum, made at the time, showing such measurements. *Wanta v. Milwaukee E. R. & L. Co.* 295

5. One physical situation demonstrated to have existed, or one circumstance established beyond any reasonable ground for doubt, may outweigh the most positive uncontradicted evidence of one or any number of witnesses. *Jeffers v. Green Bay & Western R. Co.* 315

EXCEPTIONS. See APPEAL, 3. MUNICIPAL CORPORATIONS, 3.

EXCESSIVE DAMAGES. See DAMAGES, 5–8. NEW TRIAL, 2. WATERS AND WATERCOURSES, 3.

EXECUTORS AND ADMINISTRATORS.

Allowance of claims: Adverse party.

1. In a hearing on claims in probate court, an heir is not an adverse party, in the practice sense,—the personal representative is such party as to the claimant. *Estate of Koch,* 548
2. Notwithstanding No. 1, an heir of the deceased may be permitted to appear, personally or by attorney, in such a hearing to protect his remote interest. *Ibid.*
3. In case of permission as in No. 2, an heir is not an adverse party, in respect to an appeal from probate court, on which notice must be served. *Ibid.*

Same: Enforcement. See CURTESY, 1.

Appeal from county court. See APPEAL, 15.

EXEMPTIONS. See TAXATION, 9, 10, 20–23.

EXPERT TESTIMONY. See EVIDENCE, 2, 3. RAILROADS, 6.

EXTRA COMPENSATION. See OFFICERS, 11, 12.

EXTRA WORK. See RAILROADS, 8–11.

FELLOW-SERVANTS. See MASTER AND SERVANT, 10.

FENCES. See RAILROADS, 13.

FINAL ORDER. See COURTS, 8. DEPOSITIONS, 2.

FINDINGS by court. See TRIAL, 22–27.

FIRE INSURANCE. See INSURANCE.

FLOWAGE. See WATERS AND WATERCOURSES.

FORECLOSURE. See MORTGAGES.

FORFEITURES. See LANDLORD AND TENANT.

FORMER DECISION. See APPEAL, 13.

FRANCHISE. See CONSTITUTIONAL LAW, 9. PUBLIC UTILITIES, 10–13.

FRAUD. See CONTRIBUTION, 13, 18. REFORMATION OF INSTRUMENTS, 1.

FRAUDULENT REPRESENTATIONS. See APPEAL, 5.

GOOD FAITH. See COUNTIES, 1.

GRADE of street. See MUNICIPAL CORPORATIONS, 1, 2, 4, 7, 8.

GRAIN COMMISSION. See OFFICERS, 1–10.

GUARANTY. See BONDS. CONTRACTS, 5. CONTRIBUTION, 6, 7, 10, 14–16, 18.

GUARDIAN AD LITEM.

A guardian *ad litem*, in judicial proceedings, may waive a mere irregularity therein, by permission of the court. *Estate of Koch,* 548

GUARDIAN AND WARD.

Testamentary guardians.

Whether or not testatrix had a legal right, as against her divorced husband, to appoint a testamentary guardian over the persons of their children, whose custody had been awarded to her, she had the power, as incident to the disposition of her property, to vest the title thereto in a so-called guardian, and the naming of a person as guardian for the children in her will merely made such person a trustee of their property during minority. *Otjen v. Frohbach,* 301

GUARDING MACHINERY. See MASTER AND SERVANT, 6–8, 20. NEGLIGENCE, 1.

HABEAS CORPUS.

1. There is no statutory warrant for the admission to bail, in *habeas corpus* proceedings, of one rightfully in custody upon a commitment issued by a court of competent jurisdiction after conviction of a criminal offense. *In re Murphy,* 292
2. Where the circuit court has by order set aside proceedings of a court commissioner acting without jurisdiction (in this case admitting to bail a convicted man serving his sentence) and it appears that due notice of the motion and due opportunity for defense were given and that no substantial rights have been lost, this court will not necessarily disturb such order of the circuit court merely because it did not issue the proper formal writ—especially where the right result was unquestionably reached. *Potter v. Frohbach,* 133 Wis. 1, limited. *Ibid.*

HIGHWAYS.

Establishment.

1. Proceedings of town supervisors upon an application for the laying out of a highway, which did not include any "determination" thereon, are not a bar to their acting upon a new application for such highway within one year. *State ex rel. Ronglien v. Clemenson,* 268
2. In an order laying out a highway the description thereof is sufficient if, although the number of the section is omitted in describing the starting point, any surveyor could accurately locate the road by beginning at the designated ending and working backward, and only the section intended will answer the calls of the description. *Ibid.*

HOSPITALS FOR INSANE. See INSANE PERSONS.

HUSBAND AND WIFE. See CURTESY. PARTIES.

IMPLIED CONTRACTS. See CONTRIBUTION, 7, 10, 12.

INCOME TAX. See COURTS, 21, 22. TAXATION, 1–19.

INCOMPETENT PERSONS. See INSANE PERSONS.

INCOMPETENCY of servant. See MASTER AND SERVANT, 1–3.

INDETERMINATE PERMIT. See PUBLIC UTILITIES, 6, 11, 12, 14–19, 22, 24.

INFANTS. See DAMAGES, 6, 8. INSTRUCTIONS TO JURY, 6. MASTER AND SERVANT, 1–3, 14, 19, 24.

INJUNCTION.

Subjects of protection and relief. See COURTS, 4–8.

Grounds of relief. See PLEADING, 1. PUBLIC UTILITIES, 24, 25.

1. An averment that property in the possession of complainant is threatened with destruction or confiscation by unwarranted statutory declaration that it is a public nuisance and by the imposition of penalties for the use of such property, sets forth a private wrong calling for the interposition of equity *quia timet* against ministerial officers charged with the execution of the statute. *Water Power Cases,* 124
2. Where it is averred that all improvements to navigation constructed under former statutes and existing in the navigable rivers of the state are still recognized as such improvements by a new statute, but also by the latter declared to be public nuisances and threatened with abatement and destruction, and their maintenance, use, and up-keep penalized except upon conditions plausibly charged to be invalid and unenforceable, a threatened public wrong affecting the sovereign prerogatives of the state and calling for prevention by injunction is sufficiently averred. *Ibid.*
3. In the case last cited the supreme court will exercise its original jurisdiction. *Ibid.*

Temporary injunction. See COURTS, 5.

INSANE PERSONS.

Care and maintenance: County's liability for patient's support.

Where, upon the application of a county to which the support of an inmate of a state hospital or county asylum has been charged, the state board of control has made an order, pursuant to sec. 591, Stats. (1898), that such support is chargeable to another county, the latter county may, even though it has not appealed from such order and the time limited for taking an appeal has expired, apply for relief from the burden imposed by such order, and upon such an application it may be claimed, and the board of control has power to determine, that the county first named was in fact properly chargeable with such support. Nothing in the language of said sec. 591, giving the county named in the first order the right to apply for relief therefrom, limits its right to litigate the question of liability so as to exclude the county with which that question was previously litigated. *State ex rel. Monroe Co. v. Vernon Co.* 274

INSTRUCTIONS TO JURY.

General rules. See APPEAL, 8.

1. In determining whether or not sentences and parts of sentences excepted to in the charge to the jury were incorrect or misleading, they must be considered and interpreted in connection with the other parts of the charge and the questions in the special verdict to which they were directed. *Ruck v. Milwaukee Brewery Co.* 222

2. Recalling the jury immediately after they had retired, and stating that upon request of plaintiff's counsel the court would instruct them as to the burden of proof, was not in this case a proceeding prejudicial to defendant, although the court had refused, in the presence of the jury, to instruct as requested by defendant's counsel upon the burden of proof. *Ibid.*

Requests for instructions. See APPEAL, 5. INSTRUCTIONS TO JURY, 7. INTOXICATING LIQUORS, 4. RAILROADS, 1.

3. A requested instruction giving prominence to alleged tests of the machine when not in actual use and assuming facts as established upon which the testimony was conflicting, was properly refused. *Mickuczauski v. Helmholz Mitten Co.* 153

4. Refusal to give a requested instruction is not error where the material parts thereof are included in the instructions given, which fully cover the questions submitted to the jury. *Ruck v. Milwaukee Brewery Co.* 222

5. Refusal to give a requested instruction calling attention specifically to plaintiff's interest in the result, as bearing upon the weight and credibility of his testimony, was error; but under sec. 3072*m*, Stats. (Laws of 1909, ch. 192), there having been a general instruction on the subject, covering the testimony of all the witnesses, the error is *held* not a ground for reversal. *Vogel v. Herzfeld-Phillipson Co.* 573

Damages. See ANIMALS, 5. DAMAGES, 1, 3. MUNICIPAL CORPORATIONS, 9. WATERS AND WATERCOURSES, 2.

6. In an action by a minor for personal injuries, where there was no evidence of emancipation, it was error to instruct the jury that they might allow for diminished earning capacity from the time of the injury, instead of from the time of plaintiff's majority. [Whether such error alone would be ground for reversal, not determined.] *Kruck v. Wilbur Lumber Co.* 76

Defenses. See INTOXICATING LIQUORS, 6.

Evidence: Weight. See INSTRUCTIONS TO JURY, 9.

Intoxicating liquors. See INTOXICATING LIQUORS, 5, 6.

Machinery. See INSTRUCTIONS TO JURY, 3. MASTER AND SERVANT, 20.

Negligence: Motormen.

7. In an action for injuries to a traveler whose buggy was struck at night by an electric car coming from behind, instructions to the effect that it was the duty of the motorman in the exercise of ordinary care to keep a proper lookout to avoid collision with persons and vehicles upon the streets; that the street car at the time of the accident was entitled to precedence in the use of the portion of the street upon which the tracks were constructed; that the motorman had the right to assume the ordinary traveler would yield to the passage of the car; and that he was entitled to indulge in such presumption until the contrary became apparent to a person exercising ordinary care in the same or similar circumstances,—were correct in the abstract; and although the court might, if requested, have been required to add exceptions or modifications recognized by law, yet in the absence of any such request the failure to do so was not error. *Brown v. Milwaukee E. R. & L. Co.* 98

8. Although in such a case it would have been better to treat the negligence of the defendant and that of the plaintiff separately in the instructions, yet it cannot be held that the jury were misled or that there was error prejudicial to the plaintiff because, in the charge upon the question of contributory negligence, the trial court referred to the general rules as to the relative rights and duties of the motorman and a traveler upon the highway, which had previously been given upon the question of defendant's negligence. *Ibid.*

9. Neither the testimony of a traveler whose buggy was struck by an electric car that, at and before the time of the collision, he was listening for the gong of an approaching car and did not hear it, nor the testimony of one who was in the street waiting for the car to go by so that he could go on with the matter he had in hand that he heard no other noise than the vibration of the car in motion, was merely negative testimony, though negative in form; and it was error to give to the jury, with reference to such testimony and the testimony of the motorman that he did sound the gong, the rule as to the comparative weight of positive and negative testimony. *Ibid.*

10. The error in giving such rule was not, however, prejudicial to the plaintiff in this case, the jury having found him guilty of contributory negligence in a particular not affected by the failure to sound the gong and such finding not having been influenced by the erroneous charge. *Ibid.*

Ordinary care. See RAILROADS, 5.

Passengers. See STREET RAILWAYS, 1.

Rape. See RAPE, 3.

Reasonable doubt. See INTOXICATING LIQUORS, 4, 6.

Witnesses. See INSTRUCTIONS TO JURY, 5.

INSURANCE.

FIRE.

Breach of condition: Renewal of policy.

1. In an action upon an insurance policy breach of a condition rendering the policy void is a matter of defense. *Farley v. Spring Garden Ins. Co.* 622

2. It was not error in such a case to permit plaintiff to introduce evidence of an estoppel in anticipation of the defense of breach of such a condition. *Ibid.*

3. Although the Wisconsin standard policy contains a provision that it "shall be void if the subject of insurance be a building on ground not owned by the insured in fee simple," yet a company issuing such a policy and receiving and retaining the premium with knowledge that the insured does not own the land upon which the building stands is estopped from declaring the policy void. *Ibid.*

4. The company's knowledge of such fact at the time of issuing a policy is equally binding upon it when it issues a renewal thereof; and it is immaterial whether the company's agent had in mind, at the time of the renewal, the information which he had received when the original policy was issued. *Ibid.*

5. Under sec. 1941—51, Stats. (1898), it is not necessary for the insured, at the time of renewal of a policy, to furnish any information except as to increase of hazard, and the renewal is subject to the terms and conditions of the original policy. *Ibid.*

INTENTION. See PARTNERSHIP.

INTEREST. See PARTNERSHIP, 1. TRUSTS AND TRUSTEES, 4.

INTOXICATING LIQUORS.

1. Whether sec. 1564, Stats. (1898), prohibiting the sale of liquor on certain days by "any tavern keeper or other person," applies only to persons duly licensed to sell liquors, not determined. *Reismier v. State,* 593
2. In a prosecution for violation of said statute, where there is proof that defendant was a tavern keeper, it will be presumed, in the absence of evidence to the contrary, that he was a licensed tavern keeper, rather than that he was engaged in an unlawful business; hence in such a case the admission of parol evidence on the part of the state to show that defendant was licensed was not a prejudicial error. *Ibid.*
3. Rejection of evidence as to the mental capacity of the person who actually sold the liquor was not a prejudicial error where the evidence on the part of the state to show that defendant was to act as his bartender and was temporarily in charge of the bar was admitted. *Ibid.*
4. Where in the general charge the jury were fully instructed that before they could convict they must find defendant guilty beyond a reasonable doubt and must find that the sale was made by him either in person or by his agent, it was not error to refuse a requested instruction to the effect that defendant would not be responsible for a sale by a mere interloper who was not his agent. *Ibid.*
5. An instruction to the effect that if the liquor was sold illegally by his bartender or agent defendant would be guilty the same as though he had performed the illegal act himself, because "the law makes him responsible for the legal operation and running of his saloon or bar," was correct and not misleading. *Ibid.*
6. An instruction to the effect that sale by an interloper is an affirmative defense, and the defense should show that the seller was an interloper and not a representative of the defendant, is construed to mean that defendant might raise a reasonable doubt by such showing. *Ibid.*
7. Where the sale in question was actually made by one T., the ruling out of a question to defendant, "Did you ever trust the business to T.?" was not prejudicial error, where other more pertinent questions covering the subject of T.'s authority were asked and the answers admitted. *Ibid.*

JUDGMENT.

Form. See TRESPASS.

On trial of issues. See EMINENT DOMAIN, 5.

Rendition: Irregularity.

1. But one final judgment should be entered in an action. Where, however, two defendants are entitled to a judgment in their favor, entry of a judgment in favor of one, ignoring the rights

of the other, is a mere irregularity, and such judgment will not be reversed on an appeal by the plaintiff. *Loomis v. Besse*, 647

2. One of two defendants who were entitled to a judgment in their favor had a judgment entered in his favor, ignoring the rights of the other, and a separate judgment was afterwards entered in favor of the other. Upon appeal the latter judgment is affirmed, this court being equally divided upon the question whether the error in entering such second judgment was one affecting the substantial rights of the plaintiff. *Loomis v. Loomis*, 653

JUDICIAL QUESTIONS. See CONSTITUTIONAL LAW, 3.

JURISDICTION. See ABATEMENT AND REVIVAL, 2. COURTS. HABEAS CORPUS, 2. INJUNCTION, 3. SUMMONS. TAXATION, 24.

JUSTIFICATION. See CONVERSION, 2.

LACHES. See EQUITY.

LAKES. See NAVIGABLE WATERS, 1–4.

LANDLORD AND TENANT.

Terms for years: Covenants against assignment or subletting: Forfeiture: Waiver.

1. Acceptance of rent by the lessor from an assignee of the lease, with knowledge of and oral assent to the assignment, constitutes a waiver of the breach of the covenant in the lease against assignment without the written consent of the lessor. *Katz v. Miller*, 63
2. Such acceptance of rent after knowledge that the premises have been sublet is also a waiver of prior breaches of the covenant against subletting. *Ibid.*
3. A waiver by trustees of the breach of a covenant against assignment in a lease of trust property, operates to discharge the forfeiture both as to them and as to their successors in office. *Ibid.*
4. Where the assignee of a lease submitted to the lessors his plan for changes proposed to be made in the building to fit it for use as a store and offices, to be sublet by him throughout the term of the lease, and with their knowledge and consent expended a large sum in carrying out such plans, and such lessors continued for a number of years to accept rent with knowledge of subletting by him, they are estopped from enforcing a subsequent forfeiture for subletting to a new tenant. *Ibid.*
5. Where, pending an action by the assignee of a lease to restrain the lessor from enforcing an alleged forfeiture for breach of a covenant against assignment and subletting, the parties made a stipulation by which they evidently intended to preserve to each the right to prosecute the action to a final determination, an appeal by the lessor from an adverse judgment will not be dismissed on the ground that, after appealing, he gave notice of termination of the tenancy under certain provisions of the lease, thus recognizing it as a subsisting contract and leaving nothing to be adjudicated in the action. *Ibid.*

Rents. See MINES AND MINERALS.

LAW OF THE CASE. See APPEAL, 13.

LEASES. See LANDLORD AND TENANT. MINES AND MINERALS.

LEGISLATIVE POWERS. See CONSTITUTIONAL LAW, 1, 2. COURTS, 21. MUNICIPAL CORPORATIONS, 22. NAVIGABLE WATERS, 1.

LEGISLATURE. See OFFICERS, 8–10.

LICENSE: When revocable. See MINES AND MINERALS, 2.

LICENSEE: Injury to. See RAILROADS, 2, 5, 6.

LIENS. See RAILROADS, 12.

LIFE ESTATES. See WILLS, 6, 7.

MACHINERY. See DAMAGES, 8. INSTRUCTIONS TO JURY, 8. MASTER AND SERVANT, 4–8, 13–24. TRIAL, 13, 17.

MARRIED WOMEN. See DAMAGES, 2, 3, 5.

MASTER AND SERVANT.

The relation. See CORPORATIONS, 3–5.

Master's liability for injuries to servant. See RAILROADS, 14–16.

Same: Competency of servant.

1. Age may be an important factor in determining the competency of a servant; and where he has just passed the age at which he could legally be employed the other facts needed to show his incompetency may be few and in themselves insignificant. *Vogel v. Herzfeld-Phillipson Co.* 573
2. Thus, in the case of an elevator boy sixteen years and seven months of age, proof that in size and weight he was below the average boy of his years and that he was somewhat pale and nervous, together with testimony tending to show that he got tired toward evening and occasionally stopped the elevator too suddenly, causing it to bound, was sufficient to sustain a finding of incompetency. *Ibid.*
3. Evidence that such elevator boy smoked cigarettes and that he did not have enough to eat was not admissible to show negligence on the part of his employer in retaining him in such employment, where no actual or presumptive knowledge of these facts on the part of the employer was shown. *Ibid.*

Same: Machinery. See DAMAGES, 8. MASTER AND SERVANT, 13–24. NEGLIGENCE, 1.

4. In an action for injuries sustained by an employee in falling against the machine at which he was working in defendant's factory, a nonsuit was properly granted, it not being shown that the machine was one which the statute required to be fenced or guarded or that any defect therein caused the injury, and it appearing that plaintiff had been properly instructed but that he unnecessarily placed himself in a dangerous and very awkward position in attempting to stop the machine by shutting off the power and applying the foot brake simultaneously; that his fall was caused by such attempt coupled with the slippery condition of the floor; and that he had assumed the risk arising from such condition. *Noetzel v. A. George Schulz Co.* 106
5. In an action for negligent injury to a servant it is *held* that findings by the jury, to the effect that the bursting of a carborundum wheel was caused by a small casting, which plaintiff was grinding, becoming wedged between the face of the wheel and the inner edge of the rest, and that such wedging was due to

improper adjustment of the wheel and rest, are supported by the evidence, and that the facts so found are not impossible, demonstrably incorrect, or contrary to unvarying natural laws, so as to warrant interference with the verdict. *Guidinger v. Smalley Mfg. Co.* 194

6. Where a rapidly revolving belt was so located as to come within two or three inches of the sleeve of the operator of a machine when he attempted to make adjustments with a wrench, it was a question for the jury whether it was so located that under sec. 1636*j*, Stats. (1898), it was required to be securely guarded. *Kruck v. Wilbur Lumber Co.* 76

7. The knives in one of the heads of a "molding sticker" in a planing mill were neither "shafting" nor "gearing" within the meaning of sec. 1636*j*, Stats. (1898), and were not required thereby to be guarded. Whether or not, in this case, such knives were so located that, irrespective of statutory requirements, the master was charged with the duty of guarding them, was a question for the jury. *Ibid.*

8. Even though such knives should have been guarded, yet, such guarding not being required by sec. 1636*j*, Stats. (1898), the employer may, in an action for injuries to an employee caused by such knives, defend upon the ground that the plaintiff assumed the risk. *Ibid.*

Same: Places to work: Scaffolds.

9. The duty of a master to furnish for his servants a reasonably safe place in which to work is an absolute duty which cannot be delegated. *Wnek v. Superior Shipbuilding Co.* 618

10. In an action for injuries sustained by a member of a riveting crew in defendant's shipyard, caused by the collapse of a scaffold on which he was working, evidence, stated in the opinion, is *held* to show that defendant had not performed its duty to furnish a reasonably safe place to work and that the negligence was not that of fellow-servants. *Ibid.*

Same: Open pit.

11. In an action by a servant for injuries received by falling into an open pit on defendant's coal dock, the evidence is *held* to sustain findings by the jury to the effect that the injury was proximately caused by negligence of defendant's superintendent, and that plaintiff was free from contributory negligence. *Ennis v. M. A. Hanna Dock Co.* 655

12. Sometimes a person is bound to think with reference to where he is about to place his feet, but generally speaking one's attention may be diverted, even by small circumstances, so as to render him excusable by the standard of ordinary care for stepping into a hole or colliding with an obstruction which attention would readily disclose, and even with which he is perfectly familiar. *Ibid.*

Same: Warning servant of dangers. See MASTER AND SERVANT, 23.

13. The rule that an employer owes a duty of warning to an employee set at work at a machine in the operation of which there is a concealed danger which the employer knows or ought to know about, but of whose existence the employee does not and in the exercise of ordinary care cannot know, applies as well where the danger comes from an involuntary and automatic act of the employee resulting from the necessary routine movements in

operating the machine (such as the pressing down of a treadle in the operation of a punch press) as where it results from some unexpected movement of the machine itself which could not be foreseen by the employee. *Kaczmarek v. Geuder, P. & F. Co.* 46

14. Where a boy about seventeen years old, having little previous experience with a punch press, was set at work punching small pieces of tin, each in a single operation, at the rate of about thirty-five a minute, and was told to look out and not get his fingers cut off, and also told that should a piece of tin stick in the die after being punched he should take another piece of tin and remove it, and was injured by reason of an involuntary movement of his foot pressing down the treadle while he was attempting to remove a piece of tin as instructed, it was for the jury to say whether such psychological or physiological danger existed, and whether the defendant or plaintiff or both were chargeable with knowledge of it. *Ibid.*

15. Evidence that numerous similar accidents had occurred in the same factory through a period of years, with perfect machines, the injured employees claiming that the presses repeated without any pressure upon the treadle, was both competent and of probative force upon the question of the employer's duty to know and give warning of such danger. *Ibid.*

16. Testimony of one who had been superintendent in another factory as to the results of his own observation of operators at work at similar machines, also that of a state factory inspector as to knowledge obtained from personal observation and by talking over the subject with foremen, was competent upon the same question. *Ibid.*

17. Common knowledge must of necessity be largely obtained from talking with others. *Ibid.*

18. The objection that a warning against such an involuntary sequence of muscular activities would be of no avail cannot be considered as tenable. The duty to warn is not lessened by the fact that the warning may fail of its purpose through inattention or disobedience on the part of employees. *Ibid.*

Same: Fellow-servant. See MASTER AND SERVANT, 10.

Same: Assumption of risk. See MASTER AND SERVANT, 8, 20. NEGLIGENCE, 1.

Same: Contributory negligence. See MASTER AND SERVANT, 11. NEGLIGENCE, 4, 5.

19. In an action for injuries to a seventeen-year-old employee in a planing mill, sustained in attempting to adjust the head of a "molding sticker" while it and the pulleys were in motion, upon evidence showing, among other things, that he had been instructed by the foreman to do so and that other employees customarily did it with the parts in motion, the question of contributory negligence was one for the jury. *Kruck v. Wilbur Lumber Co.* 76

20. A finding by the jury in such case absolving plaintiff from contributory negligence cannot be considered as a finding that he did not assume the risk from unguarded revolving knives of the machine, especially in view of the instructions given to the jury and of the statute, sec. 1636*j*, Stats. (1898). *Ibid.*

21. In an action for injuries to plaintiff's hands, caused by the abnormal and unexpected descent of the heavy beam of a beam-die press machine at which he was working, the question of contributory negligence was one for the jury. *Mickuczauski v. Helmholz Mitten Co.* 153

22. The mechanical impossibility of such irregular movements of the beam was not in this case such an established or conceded fact as to overcome the testimony of numerous witnesses, shown to be in a position to know and having special knowledge on the subject, that they could and did occur; and it was therefore for the jury to determine the fact. *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277, distinguished. *Ibid.*

23. Findings of the jury to the effect that prior to plaintiff's injury the machine was liable to get in such condition that while being operated the beam would sometimes come down to the die without any pressure being applied to the treadle; that defendant had knowledge of that fact, and failed to warn the plaintiff of the danger, and was therein guilty of a want of ordinary care which was the proximate cause of the injury; and that plaintiff was not guilty of contributory negligence,—are *held* to be supported by the evidence. *Ibid.*

24. In an action by a minor servant for injuries received in falling from a freight elevator, although he had himself opened the gate and the evidence strongly tended to show that the accident was caused by his attempting to leave the car while it was in motion, yet, the jury having given credence to his denial of such attempt, it cannot be said as a matter of law that he was guilty of contributory negligence. *Vogel v. Herzfeld-Phillipson Co.* 573

MAXIMS.
Enumeratio unius est exclusio alterius, 423.
Expressio unius est exclusio alterius, 528.
De minimis non curat lex, 531.

MEANDER LINES. See NAVIGABLE WATERS, 1–4.

MEASURE OF DAMAGES. See ANIMALS, 2, 5. DAMAGES, 1–4. EMINENT DOMAIN, 2, 3. INSTRUCTIONS TO JURY, 6. MUNICIPAL CORPORATIONS, 4. WATERS AND WATERCOURSES.

MINES AND MINERALS.

See PLEADING, 1.

1. In an action to recover moneys paid as royalties under a mining lease, on the ground that the lessor had no title to the ores and plaintiff had been obliged to pay royalties also to the true owner thereof, a demurrer to the complaint, overruled by the trial court on the ground that it appeared from the allegations that the lease was without consideration and void, should have been sustained because the complaint shows that surface rights belonging to the lessor were included in the lease and, for aught that appears, the use of such rights may have been adequate consideration. *Platteville Lead & Zinc Co. v. Hill,* 241

2. The question being whether defendant, who had been mining on plaintiffs' land under a parol license, had struck a valuable discovery or prospect so that, under sec. 1647, Stats. (1898), his

license could not be revoked, findings by the trial court to the effect that the ore found by the defendant was not a new or valuable discovery nor a valuable prospect are *held* to be sustained by the evidence. *Duval v. Welch*, 244

MISTAKE. See EQUITY. REFORMATION OF INSTRUMENTS, 1.

MONOPOLY. See PUBLIC UTILITIES, 17–22.

MORTGAGES.

A conveyance of land subject to an existing mortgage to the grantee, and an agreement to reconvey upon payment of all the interest on that mortgage and certain other sums, were themselves, taken together, a mortgage; and in an action by the representative of the grantee named in the conveyance for strict foreclosure of the agreement to reconvey, the complaint, alleging that the interest on the mortgage first mentioned remains due and unpaid, is *held* to state a cause of action, not for strict foreclosure, but for a statutory foreclosure for such interest. A general demurrer to the complaint was therefore properly overruled, under sec. 2649*a*, Stats. (Laws of 1911, ch. 354). *Von Oehsen v. Brown*, 236

MUNICIPAL CORPORATIONS.

Incorporation: Charter. See MUNICIPAL CORPORATIONS, 11, 16–18, 26, 32.

Ordinances. See TRIAL, 4.

Public utilities. See PUBLIC UTILITIES, 1, 4, 8, 12, 13, 17–22.

Public improvements: Streets: Change of grade.

1. Evidence that abutting property owners paved a street, with the consent of the city council and of the board of public works and under the supervision of said board and of city engineers, is evidence that the pavement was laid to the established grade, even though all of such acts were without authority of law. *Gross Coal Co. v. Milwaukee*, 72

Same: Viaducts: Damages.

2. The provision in the Milwaukee city charter that no lotowner who shall have signed a petition for a change of the street grade or for the grading of the street in conformity with such altered grade shall be entitled to compensation, etc., does not constitute an *exception* to the statutory right to recover for damage caused by such a change, but rather a condition which goes to defeat it, and hence is matter of defense. *Pabst Brewing Co. v. Milwaukee*, 582
3. An "exception" exempts something absolutely from the operation of a statute by express words in the enacting clause, while a "proviso" defeats its operation conditionally. *Ibid.*
4. Under ch. 376, Laws of 1901, providing for the construction of viaducts, the damages to abutting lotowners on a street upon which such a viaduct is built are to be ascertained in the same manner as in cases of alteration of street grades, and a contrary intent is not evinced by the provision in sec. 2 of that act, that "as soon as practicable" after plans, specifications, and

an estimate of cost have been made, "the city may enter upon the construction" of the viaduct. An estimate of benefits and damages must therefore be had before the city proceeds with the construction. *Ibid.*

5. Where the city omits to take the necessary steps for the assessment of benefits and damages before proceeding with the work, an abutting lotowner whose property is damaged by the construction of the viaduct may maintain an action against the city to recover such damages. *Ibid.*

6. The construction of a viaduct in a street graded to an established grade is an alteration of such grade which, under the charter of Milwaukee, entitles abutting owners to recover the actual damages sustained by reason thereof. *Ibid.*

7. It being admitted that prior to the paving of a street (on which a viaduct was afterward constructed) the city had by ordinance established the grade thereof, proof that the common council ordered said street to be paved with granite blocks, but on petition of the property owners permitted them to pave it with cedar blocks; that street levels of the established grades were furnished by the city engineer; that the work was done conformably to such levels, and when completed was approved by the department of public works; and that the common council allowed and ordered paid to such owners the cost of paving the street intersections,—is *held* to justify the ruling of the trial court that as a matter of law the street when paved was graded to the established grade. *Ibid.*

8. In such case, the original bed of the street having been of a low and swampy nature, the fact that after fourteen years use a new survey showed the actual grade to vary from the established grade at the time of paving, did not raise such a conflict as to require submission of the evidence to the jury. *Ibid.*

9. In the absence from the record of the instructions upon the subject of damages, this court must assume on appeal that the jury was properly limited to the actual depreciation in the market value of plaintiff's property, and cannot say that evidence admitted over objection as to the original cost of the buildings and land, as to the effect of the viaduct and its use upon the light and dampness of plaintiff's property, and as to the effect of the noise and vibration upon the property itself and its occupancy, was prejudicial to the defendant. *Ibid.*

10. The city in constructing a viaduct having acted in disregard of the statute and being therefore a trespasser upon plaintiff's property rights, is liable for injury to the foundation and walls of plaintiff's building caused by vibrations from the driving of piles for the foundations of the viaduct piers, that being a proximate result of the construction of the viaduct and attributable to the city's wrongful act. *Ibid.*

Same: Letting contracts.

11. The Milwaukee city charter, providing that the board of public works shall enter into "a contract" for the work of improving a street, does not require the entire work to be let in one contract; and where there are two different kinds of work to be done (as macadamizing and cement work), they may be let to different contractors. *Parkes v. Milwaukee,* 84

Same: Liability of railroads for special assessments.

12. In an action by a railway company to set aside special assessments against certain lands for street improvements, allegations in the complaint that plaintiff is the owner of the lots, that they are part and parcel of its right of way, that its line of railway was at the time of the assessment operated as part and parcel of its system of railway for public use, and that the said lands constituted necessary right of way, are construed to mean that the plaintiff is the owner in fee of the lots and not of a mere easement or right of way over them. *Chicago, M. & St. P. R. Co. v. Milwaukee,* 39

13. Ch. 425, Laws of 1903 (sec. 1210*k*, Stats.: Supp. 1906), providing that the property of all corporations, including railway companies, "shall be in all respects subject to all special assessments for local improvements in the same manner and to the same extent as the property of individuals," is a valid enactment, and under it lands of a railway company, though used solely for a right of way, are subject to special assessments for street improvements. *Ibid.*

14. Under said statute the land is to be considered in its general relations, irrespective of the particular use to which it may be put. *Ibid.*

15. What was said in *Chicago, M. & St. P. R. Co. v. Milwaukee,* 89 Wis. 506, to the effect that, as a matter of law, a railway company's right of way is not benefited by the improvement of the street upon which its abuts, is overruled. *Ibid.*

Same: Repairing and rebuilding sidewalks: Special assessments.

16. No preliminary estimate or assessment of benefits or damages is required under either sec. 16 or sec. 17, subch. VII, Milwaukee city charter, before the board of public works can cause a sidewalk to be repaired or rebuilt. *Abbot v. Milwaukee,* 22

17. It is not required, under said sections, that the material of the old sidewalk be used in building a new one, but a defective wooden walk may be replaced with a cement walk. *Ibid.*

18. Nor is it required that a separate contract be let for each sidewalk to be rebuilt, but the work may be done under an omnibus contract at a certain price per square yard for all such walks as they may be ordered throughout the year. *Ibid.*

19. The resolution of the board of public works, required by said sec. 17, declaring a sidewalk to be in a dangerous condition to persons passing over it, need not specifically state that it is "the judgment of the board" that such dangerous condition exists, nor is it essential that the board should have personally examined the sidewalk condemned. *Ibid.*

Same: Special assessments: Premature entry on tax roll.

20. Where the original assessment of benefits is made in a single sum for the entire work, there is no apportionment of the benefit and the law contemplates that the work should be fully completed before the assessment goes upon the tax roll and payment becomes compulsory. *Parkes v. Milwaukee,* 84

21. The issuing of an improvement certificate for the cost of the macadamizing in front of a lot, and the placing of the amount thereof upon the tax roll, before completion of the cement side-

walks and gutters, were, however, mere irregularities which do not affect the substantial justice of the tax and are not ground for setting it aside in equity, there being no suggestion that the remaining work is not let to a responsible contractor or will not be completed. *Ibid.*

Same: Extension of time for payment.

22. The option given the property owner by sec. 959—31, Stats. (1898), to have the time for payment of his assessment extended upon condition that he waive any illegality or irregularity in such assessment, was within the province of the legislature to grant or withhold, and such condition is valid. *Dunn v. Superior,* 636

23. The privilege granted upon such condition is analogous to the right of an election between inconsistent remedies, and a property owner having once applied for an extension and waived all objections to the assessment cannot afterwards withdraw such application and waiver. *Ibid.*

24. The fact that he did not know, at the time of applying for an extension, that his property had previously been assessed for street paving or that the cost of such previous paving had not been credited in making the new assessment, does not entitle him to relief, since the statute gives him thirty days for investigation. *Ibid.*

25. Waiver is the voluntary relinquishment of a known right. In this case plaintiffs voluntarily relinquished the right to contest the assessment, knowing that they had such right, though not knowing the facts which would make such a contest successful. *Ibid.*

26. The city having determined to accept extensions, is bound to accept all applications therefor which are legally made, and no action on its part to show acceptance is necessary to render them effective. *Ibid.*

27. In cases within the statute the privilege of the extension is an adequate consideration for the waiver required, and the doctrine of estoppel, which would bar a withdrawal of the application only in case the city had materially altered its situation relative to the matter, is therefore not applicable. *Ibid.*

Same: Appeal from common council.

28. In proceedings to pave a street under ch. 539, Laws of 1909 (secs. 959—30*a* to 959—30*j*, Stats.), a property owner need not appear before the board of public works or the city council and make objections to the assessment in order to entitle him to appeal from the final determination of the council, pursuant to sec. 959—30*g*. *Dunn v. Superior,* 636

29. By ch. 539, Laws of 1909, creating secs. 959—30*a* to 959—30*j*, Stats., the new sections are virtually made a part of sec. 959—30, Stats. (Supp. 1906), being addenda thereto; and the provisions of said sec. 959—30 and of sec. 959—31, Stats. (1898), relating to extension of the time for payment of assessments for street improvements, apply to improvements made under said new sections. *Ibid.*

30. The remedy of the property owner by appeal from the determination of the council, under sec. 959—30*g*, Stats. (Laws of 1909, ch. 539), being exclusive, the court in such cases will grant

either equitable or legal relief or both, as the case may require. *Dunn v. Superior,* 636

Same: Reassessment.

31. The statute (secs. 1210*d*, 1210*e*, Stats.: Supp. 1906) providing for a reassessment of benefits and damages where a special assessment for improvements is invalid, is a remedial statute enacted to remedy the negligence and mistakes of public officers, and therefore, if open to construction at all, should be liberally rather than strictly construed. *Abbot v. Milwaukee,* 26

32. Although the word "street" in its general sense includes sidewalk areas, the words "paving or repaving any street or alley, or part thereof," in sec. 1210*d*, Stats. (Supp. 1906), were clearly not intended to cover or include sidewalk improvements; and sec. 1210*e* (referring to sec. 1210*d*) is therefore not applicable to sidewalk improvements made pursuant to sec. 2, subch. VII, Milwaukee city charter, which contains language similar to that in sec. 1210*d* with reference to streets, and in addition provides specifically for the construction of sidewalks. *Ibid.*

Torts: Defects and obstructions in streets.

33. A hole one and three-quarters inches deep is, as a matter of law, not an actionable defect in a street; but where a hole therein was six inches deep and about eighteen inches wide and twenty-four inches long, a jury might find that the street was not reasonably safe and that the city was negligent in not repairing it. *Wanta v. Milwaukee E. R. & L. Co.* 295

34. Where holes in the street were numerous, but travel thereon was not so obviously dangerous that a person ought to be held negligent in attempting to drive over it at all, it may be a question for the jury whether he was negligent in failing to see and avoid a particular hole which caused him to be thrown from his wagon and injured. *Ibid.*

Same: Sidewalks. See DAMAGES, 7.

Same: Waterworks: Injury to property by flooding: Negligence.

35. In furnishing water to private consumers a municipal corporation is acting in a private business capacity and not in its governmental capacity, and for any failure to exercise ordinary care proximately causing injury to another is liable to the same extent as a private person or a corporation operating a waterworks system. *State Journal P. Co. v. Madison,* 396

36. While it would be negligence to attempt to construct and operate a system of waterworks without expert advice as to the location of valves, the size and strength of pipes, and other details of construction, yet in a case where reputable engineers differ in their opinions it cannot be held a want of ordinary care to adopt in good faith a plan proposed by one school of experts in preference to another; and should an accident happen resulting in damage to a third person, proof of such good-faith action based on the advice of competent and reputable experts furnishes a complete defense against liability. *Piper v. Madison,* 140 Wis. 311, explained. *Ibid.*

37. The fact that the location of a valve 260 feet distant from a water tower, instead of in the basement of the tower where the feed pipe turns upward, is not in accordance with the best engineering, does not establish negligent construction, without

proof of some added danger on that account; and where, in a water system embracing an average of twenty-nine miles of mains, there have been but three breaks in the mains in twenty-four years, and the 260 feet of pipe leading to the water tower is located at the highest point of the system and is not tapped by service pipes, the likelihood of a break therein is, *it seems*, so remote as scarcely to be a substantial factor in the problem of location of such valve. *Ibid.*

38. Where water was found to be entering the cellar of plaintiff's premises in the vicinity of a water tower on defendant's system, and defendant's employees, uncertain where the leak was located, spent three hours in uncovering and shutting off nine valves which controlled the water supply of that district, and in consequence plaintiff's premises were flooded and its property damaged, when by opening a valve in the waste pipe of the water tower and two hydrants near by, and reducing the water pressure temporarily, the tank in the tower, from which the water was coming, could have been emptied in a few minutes, it was a question for the jury whether defendant was chargeable with negligence. *Ibid.*

39. The claim that the city was liable in such case on the ground that the water tower was a nuisance because located in a public street, will not be considered on appeal, where no such claim was made in the complaint or at the trial. *Ibid.*

MUNICIPAL ORDINANCES. See TRIAL, 4.

NAVIGABLE WATERS.

Lakes and ponds: Navigability.

1. The power of the legislature to declare that nonmeandered lakes are neither navigable nor public waters, is *doubted*. Assuming that it has such power, its intent to destroy the public character of lakes navigable in fact must, to be effective, be expressed in plain and unambiguous language and not be left to doubtful inference. *Bixby v. Parish*, 421

2. Sec. 1607*a*, Stats. (1898), providing that lakes which have been meandered and returned as navigable by the government surveyors, and also those which have been meandered and are navigable in fact, are declared to be navigable and public waters, is not to be construed as a declaration that nonmeandered lakes are nonnavigable. *Ibid.*

3. A nonmeandered lake or pond, if navigable in fact, is a navigable and public body of water. *Ibid.*

4. The navigability of a nonmeandered lake is in every instance a question of fact to be determined from the evidence in each particular case. *Ibid.*

Rights of public and of riparian owners. See CONSTITUTIONAL LAW, 5–10. CORPORATIONS, 2. INJUNCTION, 2.

5. A statute declaring that all energy, developed or undeveloped, of the navigable waters of the state is subject to the control of the state for the public good, that the beneficial use and natural energy of the navigable waters of the state for all public uses are held by the state in trust for all the people, should be sustained as an assertion of the sovereignty of the state and the

power of regulation instead of an assertion of proprietorship, especially when such construction is essential to uphold the statute. *Water Power Cases*, 124

6. Sec. 1596, Stats. (Laws of 1911, ch. 652), is prospective only in its operation and, so far as it refers to streams not theretofore within the purview of the statute it purports to amend, it affects only dams, etc., placed in such streams after the act of 1911 went into effect. *Ibid.*

7. The right to use the water of a navigable river for the creation or development of power upon his own land is a riparian right appurtenant to the riparian land and belongs to the owner of such land. The *quasi*-private ownership of the bed of a navigable river and all incorporeal riparian rights are subject and subordinate to the public right of navigation, but not so the ownership of the bank. Where the ownership of the bank is necessary for the construction of a dam in aid of navigation the state is powerless to construct or authorize the construction of such dam without the consent of the riparian owner or expropriation with compensation to such owner, and the riparian owner is powerless to obtrude a dam into such navigable waters without the consent of the state. Where by joint consent of the riparian owner and of the state the riparian owner constructs such dam at his expense in aid of navigation, the consideration moving to the state is the improvement of the navigation and to the riparian owner is the creation or development of the water power. This water power and the right of the riparian owner thereunto does not in such case conflict with the public right of navigation, but is rather promotive of such right, and it continues to be a riparian right as before and the private property of the riparian owner subject to regulation by the state to a degree commensurate with its character and situation. It is in no sense the property of the state. Whether one person or another owns this resulting water power is not material to the interests of navigation. *Ibid.*

8. An act of the legislature which forbids any person to conduct or maintain or operate or use any dam or other improvements in or across any navigable stream without a franchise; which defines the word "franchise" to be one obtained under the act; which defines the word "improvements" as used in the act to include much valuable property including the riparian land; which declares such dam and "improvements" a public nuisance subject to abatement as such and penalizes the use and maintenance of such property,—constitutes, as regards owners of formerly authorized dams, a taking of the property, if in order to obtain a franchise under the act in question the owner of the property is obliged to consent to the surrender of valuable property rights belonging to him. *Ibid.*

NEGATIVE TESTIMONY. See INSTRUCTIONS TO JURY, 9, 10.

NEGLIGENCE.

Acts and omissions constituting negligence. See BAILMENT. CARRIERS. CONTRIBUTION, 17. DAMAGES, 2, 3, 5–8. ELECTRICITY. INSTRUCTIONS TO JURY, 7–10. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 33–39. RAILROADS, 1–7, 14–20. STREET RAILWAYS.

Proximate cause. See MASTER AND SERVANT, 11, 23. MUNICIPAL CORPORATIONS, 10. STREET RAILWAYS, 2.

1. A finding by the jury to the effect that an employer ought to have guarded certain machinery which the statute did not require to be guarded, without any finding upon the controverted issue as to whether the injured employee assumed the risk of its unguarded condition, establishes only nonactionable negligence. *Kruck v. Wilbur Lumber Co.* 76
2. A finding by the jury that the proximate cause of plaintiff's injury was both actionable and nonactionable negligence on the part of defendant, will not sustain a judgment for plaintiff—it being essential that there be a specific finding that defendant's actionable negligence was such proximate cause. *Ibid.*
3. In a special verdict the question relating to proximate cause should be so framed that any responsive answer will disclose what actionable negligence of defendant was or was not the proximate cause of plaintiff's injury. *Ibid.*
4. Evidence tending to show, among other things, that an elevator boy sixteen years and seven months of age, mistakenly assuming that plaintiff was about to leave the car while it was running past the third floor, stopped it so suddenly as to cause it to bound and throw plaintiff off, was sufficient to warrant the jury in finding that the negligence of such elevator boy was the proximate cause of plaintiff's injury. *Vogel v. Herzfeld-Phillipson Co.* 573

Contributory negligence. See INSTRUCTIONS TO JURY, 8, 10. MASTER AND SERVANT, 11, 19–24. MUNICIPAL CORPORATIONS, 34. RAILROADS, 4. STREET RAILWAYS, 5, 6. TRIAL, 21.

5. Evidence showing, among other things, that on a dark rainy night plaintiff, who was familiar with the street and the operation of electric cars thereon, drove in a buggy for a considerable distance on the track upon which the cars would necessarily come up behind him; that there was room for him to travel on the street outside of the tracks; that the car by which he was injured made considerable noise as it approached; and that, although it was too dark to see the tracks, he had shortly before the accident turned out to let another car pass,—is *held* to sustain a finding by the jury of contributory negligence. *Brown v. Milwaukee E. R. & L. Co.* 98

Actions: Pleading.

6. Ordinarily, in an action for personal injuries grounded on negligence, the complaint must show what specific act or acts of negligence are relied upon, and this rule will be enforced where failure to observe it would operate to the disadvantage of the defendant on the trial. *Tolleman v. Sheboygan L., P. & R. Co.* 197

NEW TRIAL.

See APPEAL, 2.

1. The granting of a new trial rests largely in the discretion of the trial court. *Gross Coal Co. v. Milwaukee,* 72
2. Defendant should be required to pay the costs of the trial as a condition of the granting of a new trial upon the ground that

the damages awarded by the jury to plaintiff are excessive. *McBride v. Milwaukee E. R. & L. Co.* 17

NONRESIDENTS. See TAXATION, 5, 6, 15, 18.

NONSUIT. See MASTER AND SERVANT, 4.

NOTICE.
Of appeal. See APPEAL, 15. EXECUTORS AND ADMINISTRATORS, 3.
Of hearing. See WILLS, 4.

NUISANCES. See CONSTITUTIONAL LAW, 1, 5, 9. INJUNCTION, 1, 2. MUNICIPAL CORPORATIONS, 39. NAVIGABLE WATERS, 8.

OFFICERS.

Appointment and qualification. See OFFICERS, 4, 10. TOWNS.

Eligibility: Incompatible offices: Vacating one by accepting other.

1. By ch. 440, Laws of 1909, the salary of grain commissioner was fixed at $200 per month, $100 of which was payable out of the state treasury and $100 out of the funds or fees collected "after all legal obligations, including any moneys advanced by the state, have been fully paid." By ch. 458, Laws of 1911, the same monthly stipend was made payable wholly out of the funds or fees collected, and the words above quoted were omitted. *Held*, that the salary was not thereby increased so as to render a member of the legislature of 1911 ineligible to the office of grain commissioner, under sec. 12, art. IV, Const. *State ex rel. Johnson v. Nye*, 659
2. The scope of the law in this respect cannot be broadened or varied, or an increase thereby in the emoluments of the office be shown, by allegations in pleadings, such as, for example, an allegation that under the act of 1911 payment of the salary is more secure and certain, or that under the act of 1909 there might be times when the amount of funds or fees collected would not be sufficient to pay that part of the salary which was payable therefrom. *Ibid.*
3. The provisions of said sec. 12, art. IV, Const., should be narrowly construed in favor of eligibility; and ineligibility should not be declared upon grounds resting in mere speculation or conjecture. *Ibid.*
4. A statutory requirement as to the time of making an appointment to a public office is directory merely; and the governor may legally appoint a state grain commissioner in October, although by law he should have made such appointment in January preceding. *Ibid.*
5. The provision in the statute creating a grain commission (sec. 2, ch. 19, Laws of 1905), to the effect that the governor before making an appointment thereto shall request the board of trade of the city of Superior to recommend a person for the position, is satisfied where such recommendation has been in fact made without request, even though the appointment is not made until nine months afterward. *Ibid.*
6. The board of trade having made one recommendation for the position, no further action by the governor in that behalf was made necessary by a subsequent notice from the board of trade that if the person so recommended was not satisfactory it

would like the opportunity to make another recommendation. *State ex rel. Johnson v. Nye,* 659

7. Where two offices are incompatible the acceptance of one by the incumbent of the other *ipso facto* vacates such other, at least in cases where such incumbent can vacate the first office by his own act. *Ibid.*

8. Under secs. 961, 962, Stats. (1898), a member of the assembly can resign and the office becomes vacant by his own act; and acceptance of an incompatible office has the same effect. *Ibid.*

[9. Whether the office of member of the assembly and that of grain commissioner are incompatible, not determined.] *Ibid.*

10. The alleged fact that a person appointed to the office of grain commissioner is without experience to enable him to properly judge and grade grain, does not affect his right to hold the office. *Ibid.*

Resignation. See OFFICERS, 8.

Compensation. See COUNTIES, 1–3. REGISTER OF DEEDS.

Same: Extra compensation.

11. The duties of a public office may, within reasonable limits, be increased without giving the incumbent a right to extra compensation. *Burgess v. Dane County,* 427

12. The provision of ch. 410, Laws of 1901, that the salaries paid under it "shall be in lieu of all fees, per diem and compensation for services rendered," precludes the recovery of any additional compensation for services germane to the office, such as the filing and indexing of vital statistics, discontinued from 1907 to 1909, but revived by ch. 188, Laws of 1909. *Ibid.*

Liability. See PLEADING, 5–7. TOWNS.

Assessor of incomes. See TAXATION, 7.

Register of deeds. See REGISTER OF DEEDS.

Town treasurers. See TOWNS.

OPINION EVIDENCE. See EVIDENCE, 2, 3. RAILROADS, 6.

OPTIONS. See CONTRACTS, 1, 2, 4. MUNICIPAL CORPORATIONS, 22.

ORDINANCES: Proof. See TRIAL, 4.

PARENT AND CHILD. See GUARDIAN AND WARD. WILLS, 5–7.

PAROL EVIDENCE. See ANIMALS, 1. EVIDENCE, 1. INTOXICATING LIQUORS, 2.

PAROL LICENSE. See MINES AND MINERALS.

PARTIES.

Adverse party. See APPEAL, 1. EXECUTORS AND ADMINISTRATORS, 1, 3.

Proper parties. See PLEADING, 9.

1. Although the wife of the owner of land was not a party to a contract for the sale thereof she is a proper party defendant to an action by the vendee for specific performance, because, having an inchoate right of dower, her interest is adverse to the plaintiff within the meaning of sec. 2603, Stats. (1898). *O'Malley v. Miller,* 393

2. The vendee in such a case is entitled, if the wife refuses to join in a deed to him, to retain from the purchase price a sum equal to the value of the contingent dower interest; and the wife ought to have her day in court on the question of such value. *Ibid.*

PARTNERSHIP.

Accounting: Interest.

1. Facts agreed upon and submitted pursuant to sec. 2788, Stats. (1898), some tending to show, and others to negative, an intention that interest should be charged,—are *held* to sustain a judgment of the court below to the effect that the surviving partner should not, in the winding up and adjustment of the partnership affairs, charge interest against the representatives of the deceased partner upon a certain account which stood on the firm books against such deceased partner and a third person. *Hoff v. Hackett,* 32

2. Intention is usually a question of fact and is always such where, from other uncontroverted facts relative to intention, contradictory inferences may be drawn. *Ibid.*

PASSENGERS. See CARRIERS, 6, 7. STREET RAILWAYS.

PAVING. See MUNICIPAL CORPORATIONS, 1, 2, 7, 8, 28.

PERMIT. See PUBLIC UTILITIES, 6, 11, 12, 14–19, 22, 24.

PERPETUATION OF EVIDENCE. See DEPOSITIONS.

PERSONAL INJURIES. See CARRIERS, 7. DAMAGES, 2, 3, 5–8. ELECTRICITY. INSTRUCTIONS TO JURY, 6–10. MASTER AND SERVANT. NEGLIGENCE. RAILROADS, 1–7, 14–16. STREET RAILWAYS. TRIAL, 13, 15, 17, 21.

PERVERSE VERDICT. See TRIAL, 10–12.

PHYSICIANS AND SURGEONS. See EVIDENCE, 2. RAILROADS, 6.

PLACE OF TRIAL. See VENUE.

PLACES TO WORK. See MASTER AND SERVANT, 9–12.

PLEADING.

Complaint. See CONTRACTS, 1, 4. CONVERSION, 1. INJUNCTION, 1, 2. MINES AND MINERALS. NEGLIGENCE, 6. RAILROADS, 8. TOWNS, 2, 3.

Same: Construction. See MUNICIPAL CORPORATIONS, 12.

Same: Sufficiency: Pleading defensive matter.

1. In an action to restrain the discharge upon plaintiffs' land of water carrying "sludge" from defendant's mine and concentrating mill situated on adjoining land, and to recover past damages therefor, the complaint set out a contract, made prior to the erection of the mill, by which plaintiffs gave to defendant the privilege of pumping and running the waste water from its mine across plaintiffs' land; and then pleaded circumstances to show that waste water carrying sludge from the mill was not intended. *Held,* (1) that it was unnecessary to plead and avoid such contract, it being properly a matter of defense; (2) the complaint stated a good cause of action without showing grounds for, or asking relief in the nature of, reformation of the contract. *Pedelty v. Wisconsin Zinc Co.* 245

2. Mere ambiguity, if any, in the contract did not call for reformation, but only for construction; reformation being required only when, by fraud or mistake, the contract fails to embrace, even obscurely, the real agreement of the parties. *Ibid.*

3. In their literal sense the words "waste water from their mine," in the contract in question, did not include water charged with sludge, and, even if ambiguous, the circumstances under which the agreement was made exclude such a construction. *Ibid.*

Same: Amendment. See STREET RAILWAYS, 3.

4. Even if the trial court erroneously overruled an objection to any evidence under the complaint, that fact does not impair the probative quality of the evidence admitted; and an appellate court should not, by disregarding such evidence, deprive the trial court of its power to permit the complaint to be amended. *Gross Coal Co. v. Milwaukee,* 72

Answer. See CONVERSION, 2.

Counterclaim.

5. In an action by a town against its former treasurer for moneys alleged to be withheld by him, a counterclaim to the effect that defendant had paid out on behalf of the town a sum in excess of the total amount received by him, states a cause of action arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim and is connected with the subject of the action, within subd. 1, sec. 2656, Stats. (1898). *Stinnett v. Noggle,* 603

6. Whether the cause of action pleaded as a counterclaim under subd. 1, sec. 2656, Stats. (1898), must have existed at the time of the commencement of the action, not determined. *Orton v. Noonan,* 29 Wis. 541, questioned. *Ibid.*

7. Where at the time of the commencement of an action by a town against a former town treasurer the plaintiff was in fact indebted to the defendant, such indebtedness, if in other respects pleadable as a counterclaim under subd. 1, sec. 2656, Stats. (1898), may be so pleaded notwithstanding the provision of sec. 824 that no action can be maintained upon such a claim until after it has been laid before the town board of audit, etc., if in fact that condition precedent be fulfilled before the expiration of the time within which defendant is required to plead. *Ibid.*

Reply. See CONVERSION, 2.

Demurrer. See CONTRACTS, 1. CONVERSION, 1. MINES AND MINERALS. MORTGAGES.

8. Upon a general demurrer to a complaint the question as to just what damages are recoverable is unimportant, it being sufficient that a cause of action for some damages is stated. *Sixta v. Ontonagon Valley Land Co.* 186

9. A proper party defendant cannot successfully demur to the complaint on the ground that he is not a necessary party. *O'Malley v. Miller,* 393

Demurrer ore tenus. See APPEAL, 2. PLEADING, 4. RAILROADS, 8.

10. Upon a demurrer *ore tenus* the allegations of a complaint should be liberally construed. *McGrath C. Co. v. Waupaca-Green Bay R. Co.* 372

11. Upon a demurrer *ore tenus* a complaint will be liberally construed and all reasonable presumptions allowed in its favor. *Pabst Brewing Co. v. Milwaukee,* 582

Prayer for relief. See DAMAGES, 1.

PONDS. See NAVIGABLE WATERS, 1–4.

POWERS. See WILLS, 7.

PREROGATIVE WRITS. See COURTS, 23. INJUNCTION, 2.

PRESUMPTIONS. See APPEAL, 4, 5. BAILMENT. CARRIERS, 1–5. CONTRACTS, 3. CONTRIBUTION, 18. COUNTIES, 1. INTOXICATING LIQUORS, 2. MUNICIPAL CORPORATIONS, 9. TRIAL, 14. WILLS, 1, 3.

PRINCIPAL AND AGENT. See BONDS.

PRINCIPAL AND SURETY. See CONTRIBUTION.

PROCESS. See SUMMONS.

PROFITS. See WATERS AND WATERCOURSES, 1.

PROVISO, in statute. See MUNICIPAL CORPORATIONS, 3.

PROXIMATE CAUSE. See MASTER AND SERVANT, 11, 23. MUNICIPAL CORPORATIONS, 10. NEGLIGENCE, 1–4. STREET RAILWAYS, 2.

PUBLIC NUISANCES. See CONSTITUTIONAL LAW, 1, 5, 9. INJUNCTION, 1, 2. NAVIGABLE WATERS, 8.

PUBLIC USE. See CONSTITUTIONAL LAW, 2, 9.

PUBLIC UTILITIES.

Purpose and scope of the law.

1. The sole purpose of ch. 499, Laws of 1907 (secs. 1797*m*—1 to 1797*m*—108, Stats.), was to promote general welfare by affording public utility service directly and indirectly to and for the public, of the highest practicable efficiency, at the lowest practicable rates under the circumstances of each particular case, having regard for existing proprietary interests and reasonable opportunity for municipal ownership on a basis of justice to existing proprietors. *Calumet Service Co. v. Chilton,* 334
2. Ambiguous parts, if there be any, of the public utility law, should be read in the most reasonably favorable light to effect the manifest purpose, comprehensive definitions of the law being adhered to regardless of technical meaning of terms. *Ibid.*
3. The basic idea of the public utility law is stated in sec. 1797*m*—3, thus: "Every public utility is required to furnish reasonably adequate service and facilities," etc. "The charge . . . shall be reasonable and just, and every unjust or unreasonable charge . . . is prohibited and declared unlawful." *Ibid.*
4. The duty and responsibility indicated in No. 3 applies to municipalities engaged in public utility business. *Ibid.*
5. Those parts of the law, other than the one declaring the purpose, are auxiliary thereto,—a prescription of means for effecting the end aimed at. *Ibid.*
6. The dominant means was classification of existing and prospective privileges to do public utility business, making the latter indeterminate and conditionally exclusive and inducing each owner of a former to join the latter as to the scope of the then existing privileges, by acquiring an indeterminate permit; thus

gathering all into a single class referable directly to a single source for existence and to a single standard for a measure of rights, duties, responsibilities, and advantages, *i. e.* the public utility law, and a single control,—the railroad commission, subject to the conditions and limitations of such law. *Calumet Service Co. v. Chilton,* 334

7. For detail means, by sec. 1797*m*—1, the person or persons, natural or artificial, in touch with the public in connection with public utility service, whether as owner, operator, manager, or controller, or private or *quasi*-public entity, is a public utility, the physical and other things in use, public utility property, and the subject of the service,—a utility,—the term "public utility" being used to characterize the physical situation and condition as to immediate authority over it. *Ibid.*

8. One, natural or artificial, public or private, municipal or otherwise, answering to the calls of sec. 1797*m*—1 of the Statutes, viewing the descriptive words in the broadest reasonable sense, and disregarding technical capacity to hold and enjoy *in præsenti*, was for regulation and control to effect the end sought, given the status indicated, subject to prescribed duties and responsibilities, with corresponding advantages, all subject to the single control under the single standard. *Ibid.*

9. "Directly or indirectly to or for the public," includes service whether to a municipality or its inhabitants, or both, or by a municipality for itself or its inhabitants. *Ibid.*

Franchises: Indeterminate permits: Acquirement: Corporate powers.

10. A privilege within the scope of No. 9, whether a license, permit, or, technically, a franchise, is the latter in the statutory sense. *Calumet Service Co. v. Chilton,* 334

11. An indeterminate permit is a perpetual exclusive privilege within the scope of the grant, subject to the code of conditions and limitations. *Ibid.*

12. An indeterminate permit duly received for an old privilege is of the same scope as the latter as to the privilege feature, freed from all considerations, limitations, reservations, and control incidents prescribed by the municipality as a state agency, including the right of repeal, if any reserved, but subject to the conditions and limitations of the public utility law. *Ibid.*

13. The law contemplates all relations created by a municipality between it and the grantee of a franchise and inhering therein as being the mutual creation of the state, through its agent, and the grantee, and subject to termination by the same mutuality. *Ibid.*

14. The essentials of "public utility" to acquire an indeterminate permit for an old privilege, are referable to sec. 1797*m*—1 of the Statutes; that of corporate status is satisfied by corporate existence *de jure* or *de facto*, referable to Wisconsin written law; that of existing privilege, by ownership of any right from the municipality, whether resting in grant, permit, license, or franchise in the technical sense, either being a statutory franchise; and that of operating under the privilege *in præsenti*, by services offered and affordable, and willingness and ability in that regard, except for reasonable and excusable cessations not involving any purpose to abandon. *Ibid.*

15. Want of corporate power referable to defect in organization and not militating against existence *de facto*, or referable to limitations of corporate purpose specified in the organic articles, which under ordinary circumstances are only subject to be inquired into by the state, directly, does not affect capacity to acquire an indeterminate permit. *Ibid.*

16. The general grant of power under the circumstances specified in sec. 1797*m*—77 of the Statutes, to acquire an indeterminate permit, by necessary implication was intended to enlarge, if necessary, corporate powers, enabling the organization to legitimately deal with the state in the exchange of equivalents,—to surrender its rights, whatever they may be, and take and enjoy the one offered in lieu thereof. *Ibid.*

Exclusiveness of permit: Monopoly: Rights of municipalities: Assignability: Injunction.

17. The privilege, conditional and temporary or otherwise, under a grant through municipal agency, to supply a municipality with a particular utility, using the public places to that end, in case of exchange thereof for the indeterminate permit of the statute, retains in the substituted franchise the privilege features, with the added element of perpetuity and the element of exclusiveness, freed from all prior conditions and limitations, but subject to those of the public utility law. *Calumet Service Co. v. Chilton*, 334

18. An indeterminate permit as in No. 17, within its scope, as to the municipality for its own service or service by it to its inhabitants, or service to others by any other public utility, is characterized by the elements of perpetuity and exclusiveness, mentioned. *Ibid.*

19. The purpose of the law was to give the holder of an indeterminate permit, as in Nos. 17 and 18, as regards the conditions existing at the time of its origin, a qualified monopoly within the scope of the privilege, subject to the conditions and limitations of the public utility law,—the term "monopoly" not being used in its common-law sense, except as to exclusiveness, but being characterized by purpose to promote public welfare, by a return consideration and by not being of common right, instead of being otherwise but for the grant and being for private gain. *Ibid.*

20. Given a field, occupied under sec. 1797*m*—77 of the Statutes, for service to a municipality and its inhabitants, and the city will be incompetent to interfere except upon obtaining from the governing commission a certificate of public convenience and necessity, evidencing that reasonably efficient service at just and reasonable rates is not obtainable under the existing privilege, or by otherwise complying with the public utility law. *Ibid.*

21. The statutory conditions which preceded the public utility law, empowering a municipality to construct or own public utility property for municipal or general use within the municipality and incur indebtedness therefor, were so superseded by such law as to render the latter paramount and the former subsidiary, making such statutory conditions usable only conditioned upon municipal compliance with such law. *Ibid.*

22. Given a public utility corporation operating in a municipality under an indeterminate permit notwithstanding reasonable and excusable interruptions of service, and all proceedings of the

city to construct a rival plant and do a rival business without first complying with the conditions of the public utility law, are void. *Ibid.*

23. A public utility property and privilege constitute an entirety, partaking of the character of the privilege, and are of proprietary nature, and assignable the same as property commonly, in the absence of any express prohibition. *Ibid.*

24. Given a situation of a public utility property operating under an indeterminate permit received in exchange for a prior privilege and the municipality, nevertheless, insisting upon conditions and limitations of the old grant, and proceeding accordingly, assuming to possess authority to do so, and invading the field reserved to the holder of the indeterminate permit without satisfying the conditions precedent in that regard, to the irreparable injury of the existing public utility,—and a situation exists for equitable interference and relief adequate to the case. *Ibid.*

25. In the circumstances stated in No. 24, if the illegitimate claim of right extends to that of invading the reserved preferential right to do the municipal lighting, the equitable relief should quiet the right of the existing public utility against such wrong claim, and afford injunctional prevention of its being acted upon. *Ibid.*

26. Language used in the opinion in *La Crosse v. La Crosse G. & E. Co.* 145 Wis. 408, 417,—speaking of a privilege, such as was grantable to an individual as well as to a corporation, as a "corporate state franchise,"—corrected. *Ibid.*

27. *Per* TIMLIN, J. The indeterminate permit obtained upon surrender of a pre-existing franchise is not necessarily a *perpetual* permit subject only to the conditions presently prescribed in the public utility law. That law is subject to repeal or amendment like other statutes. *Ibid.*

QUIA TIMET. See INJUNCTION, 1.

RAILROAD COMMISSION. See PUBLIC UTILITIES, 6.

RAILROADS.

Railroad commission. See PUBLIC UTILITIES, 6.

Electric railways: Injury to passenger: Negligently starting car: Instructions to jury.

1. In an action for injuries sustained in falling from the steps of an electric car, where the proof showed that the car was equipped with modern appliances so that it could be started without any jerk, but that at the time in question it was started so suddenly as to throw a seated person violently back and to put one who was on his feet in danger of falling unless holding to something for support, a requested instruction to the effect that the mere sudden starting of an electric car is not in itself sufficient proof of actionable negligence, that affirmative proof is necessary of an unusual jerk, and that mere statements of a witness that the start was violent or sudden is not sufficient, was inapplicable. *Otto v. Milwaukee Northern R. Co.* 54

Same: Licensee on car.

2. Persons boarding passenger cars to see relatives and friends off and to assist them if necessary, in accordance with a common

custom, are licensees and entitled to be treated with ordinary care by those in charge of the cars. *Otto v. Milwaukee Northern R. Co.* 54

3. It is the duty of those in charge of an electric car to use reasonable diligence, before starting it, to discover whether a person who has stepped upon the car has mounted to the platform or stepped back to the ground. *Ibid.*

4. A person is not guilty of want of ordinary care, as matter of law, in stepping upon the lower tread or proceeding to the platform of an electric car, with both hands engaged in carrying parcels. *Ibid.*

5. In an action for injuries to a licensee by the sudden starting of an electric car while she was standing upon the steps, a rule of the company for the guidance of its servants requiring them to exercise the highest degree of care in handling cars to avoid injuring themselves or others, imposed a higher degree of care than the law required and was not admissible in evidence; but error in admitting it was not clearly prejudicial, the jury having thereafter been emphatically instructed that the company owed the plaintiff the duty only of exercising ordinary care for her safety. *Ibid.*

6. In such action it was error to permit a physician who had attended plaintiff to testify that the fracture of her arm might have been caused by falling from a street car—that not being a subject for expert testimony; but, there being no question but that the arm was in fact broken in that way, the error was harmless. *Ibid.*

7. If defendant's servants in charge of the car did not know of plaintiff's perilous situation on the steps or were not chargeable with knowledge thereof, that fact did not displace the duty to exercise ordinary care for her safety, but merely bears upon the question whether there was a breach of such duty in starting the car. *Ibid.*

Condemnation of land. See EMINENT DOMAIN.

Construction contracts: Entire work: Substantial performance.

8. In an action to recover for extra work under a contract for construction of a railroad, the complaint, alleging that plaintiff, pursuant to the terms of the contract, completed all of the work, and that estimates and certificates certifying full compliance with the contract were furnished the defendant by its engineer from time to time as the work progressed, is *held* sufficient upon a demurrer *ore tenus*, without further allegations of waiver of conditions precedent as to written orders and presentation of bills for extras at the end of each month. *McGrath C. Co. v. Waupaca-Green Bay R. Co.* 372

9. Although the contract for the construction of a railroad provided that claims for extra work should not be allowed unless such work was done pursuant to a written order from the engineer in charge, yet where, for eight months prior to the performance of the extra work in question, plaintiff performed other extra work upon the oral order of the engineer, and the claims therefor were approved by him and paid by defendant with knowledge of the irregularity and without objection, the re-

quirement of a written order will be held to have been waived as to the work in question. *Ibid.*

10. So, also, although the contract provided that claims for extra work should be presented at the end of each month, a refusal of the engineer to receive claims for partial performance of certain extra work because the value thereof could not be computed until the completion of the road, justified a postponement of the presentation of the claims beyond the time specified. *Ibid.*

11. Where itemized statements of plaintiff's claim for extra work were approved by the engineer upon certain conditions, and plaintiff thereafter fully performed such conditions except as to two small items, the amount of which was deducted from the claim, and the engineer certified that the work of construction had been completed pursuant to the contract and that he accepted and approved the work, these facts warranted a finding that plaintiff had substantially performed the contract and was entitled to recover on the claim for extras. *Ibid.*

Same: Liens.

12. Sec. 3314, Stats. (1898), gives to those who perform labor or furnish materials in the construction of a railroad a lien therefor upon the railroad company's interest in the structures and the land upon which the improvement is situated, including its right of way, although used by the company in the operation of the railroad. Any suggestion in *Pittsburg T. Laboratory v. Milwaukee E. R. & L. Co.* 110 Wis. 633, in conflict herewith, is disapproved. *McGrath C. Co. v. Waupaca-Green Bay R. Co.* 372

Operation, when commences: Fencing right of way.

13. A railroad company does not commence to "operate" its road, within the meaning of sec. 1810, Stats. (1898), requiring it to fence its right of way within three months after so commencing, until it commences to use the road for transporting freight or passengers as a common carrier. *Nordean v. Minneapolis, St. P. & S. S. M. R. Co.* 627

Same: Liability for special assessments. See MUNICIPAL CORPORATIONS, 12–15.

Same: Injuries to passengers. See CARRIERS, 6, 7. STREET RAILWAYS.

Same: Injuries to servant.

14. Plaintiff's intestate, a switchman, was killed by being precipitated from the top of the fifth of a string of cars, which were being pushed southward in defendant's yard, when the sixth, or most southerly, car was kicked upon a switch track. There was undisputed testimony that, as the sixth car had about reached a cross street, the deceased mounted the northwest corner of that car and was seen standing thereon, and similar testimony that, at a point north of the center of the street, he ascended the ladder at the northeast corner of the fifth car,—the latter testimony being corroborated by the certainty that he was on the fifth car at the fatal moment. The trial court concluded that after mounting the sixth car the deceased had gone down the ladder at the northeast corner thereof and had mounted again at the northeast corner of the fifth car and was proceeding on the top thereof towards the sixth car when the accident happened, and directed a verdict for defendant on the ground

that deceased had gone out of the proper course without any reason therefor. *Held* that, in view of the unreasonableness of such movements and the inadequacy therefor of the time in which they must have been made if at all, the jury would have been warranted in finding that deceased did not mount the sixth car at all; and that the court should not have directed the verdict upon the theory on which it did. *Jeffers v. Green Bay & Western R. Co.* 315

15. The jury might also have found that the deceased mounted first the fifth car at the northeast corner and was proceeding on the top thereof towards the sixth car, supposing that the sixth car was to be spotted on the switch track or that notice would be taken of his position before the stop signal was given to the engineer; and that in so doing he was not acting contrary to orders and was not negligent. *Ibid.*

16. Upon the evidence above stated and evidence showing, among other things, that the deceased was not accustomed to yard work and had worked but part of one day in this yard, that the particular ways of the yard were not explained to him, and that the foreman in giving the orders under which deceased was acting had used terms which were likely to mislead as to whether the sixth car was to be kicked or spotted, the jury might reasonably have found that deceased was misled by the negligence of the foreman as to the nature of the movement to be executed; that the foreman was also negligent in not observing whether deceased was on the sixth car before giving the signal to stop the other cars; that the working place of deceased was not reasonably safe under the circumstances; and that such negligences, or some of them, proximately caused the accident. It was error, therefore, to take the case from the jury. *Ibid.*

Same: Baggage: Liability for loss.

17. A railway company accepted from one R., a passenger on an incoming train, a sample case for storage in the baggage room, giving him a claim check therefor. In the room was posted a schedule of storage charges for "baggage, either inbound or outbound, checked or not checked," and R. testified that he stored the sample case pursuant to the terms thereof. A week later he sent for it, tendering the claim check and the amount of charges according to the schedule, but it could not be found. *Held*, that if the sample case was baggage there was a bailment for hire. If the company did not intend to avail itself of the right to charge according to the schedule it should have so informed R. when he offered the case for storage. *Milwaukee M. & A. G. Works v. Chicago, M. & St. P. R. Co.* 173

18. Although it did not come from, and was not destined to, a baggage car, a sample case accepted from a passenger for storage in a baggage room is "baggage" within the meaning of a notice posted in such room, stating that "storage will be charged on each piece of baggage, either inbound or outbound, checked or not checked, remaining at station over twenty-four hours," etc.

19. By accepting without objection a sample case for storage in the baggage room, a railway company is precluded from claiming that it should have been checked at the news stand, although there was a posted notice reading, "Parcels and hand baggage checked at news stand." *Ibid.*

would like the opportunity to make another recommendation. *State ex rel. Johnson v. Nye,* 659

7. Where two offices are incompatible the acceptance of one by the incumbent of the other *ipso facto* vacates such other, at least in cases where such incumbent can vacate the first office by his own act. *Ibid.*

8. Under secs. 961, 962, Stats. (1898), a member of the assembly can resign and the office becomes vacant by his own act; and acceptance of an incompatible office has the same effect. *Ibid.*

[9. Whether the office of member of the assembly and that of grain commissioner are incompatible, not determined.] *Ibid.*

10. The alleged fact that a person appointed to the office of grain commissioner is without experience to enable him to properly judge and grade grain, does not affect his right to hold the office. *Ibid.*

Resignation. See OFFICERS, 8.

Compensation. See COUNTIES, 1–3. REGISTER OF DEEDS.

Same: Extra compensation.

11. The duties of a public office may, within reasonable limits, be increased without giving the incumbent a right to extra compensation. *Burgess v. Dane County,* 427

12. The provision of ch. 410, Laws of 1901, that the salaries paid under it "shall be in lieu of all fees, per diem and compensation for services rendered," precludes the recovery of any additional compensation for services germane to the office, such as the filing and indexing of vital statistics, discontinued from 1907 to 1909, but revived by ch. 188, Laws of 1909. *Ibid.*

Liability. See PLEADING, 5–7. TOWNS.

Assessor of incomes. See TAXATION, 7.

Register of deeds. See REGISTER OF DEEDS.

Town treasurers. See TOWNS.

OPINION EVIDENCE. See EVIDENCE, 2, 3. RAILROADS, 6.

OPTIONS. See CONTRACTS, 1, 2, 4. MUNICIPAL CORPORATIONS, 22.

ORDINANCES: Proof. See TRIAL, 4.

PARENT AND CHILD. See GUARDIAN AND WARD. WILLS, 5–7.

PAROL EVIDENCE. See ANIMALS, 1. EVIDENCE, 1. INTOXICATING LIQUORS, 2.

PAROL LICENSE. See MINES AND MINERALS.

PARTIES.

Adverse party. See APPEAL, 1. EXECUTORS AND ADMINISTRATORS, 1, 3.

Proper parties. See PLEADING, 9.

1. Although the wife of the owner of land was not a party to a contract for the sale thereof she is a proper party defendant to an action by the vendee for specific performance, because, having an inchoate right of dower, her interest is adverse to the plaintiff within the meaning of sec. 2603, Stats. (1898). *O'Malley v. Miller,* 393

2. The vendee in such a case is entitled, if the wife refuses to join in a deed to him, to retain from the purchase price a sum equal to the value of the contingent dower interest; and the wife ought to have her day in court on the question of such value. *Ibid.*

PARTNERSHIP.

Accounting: Interest.

1. Facts agreed upon and submitted pursuant to sec. 2788, Stats. (1898), some tending to show, and others to negative, an intention that interest should be charged,—are *held* to sustain a judgment of the court below to the effect that the surviving partner should not, in the winding up and adjustment of the partnership affairs, charge interest against the representatives of the deceased partner upon a certain account which stood on the firm books against such deceased partner and a third person. *Hoff v. Hackett,* 32

2. Intention is usually a question of fact and is always such where, from other uncontroverted facts relative to intention, contradictory inferences may be drawn. *Ibid.*

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PLACE OF TRIAL. See VENUE.

PLACES TO WORK. See MASTER AND SERVANT, 9–12.

PLEADING.

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Same: Construction. See MUNICIPAL CORPORATIONS, 12.

Same: Sufficiency: Pleading defensive matter.

1. In an action to restrain the discharge upon plaintiffs' land of water carrying "sludge" from defendant's mine and concentrating mill situated on adjoining land, and to recover past damages therefor, the complaint set out a contract, made prior to the erection of the mill, by which plaintiffs gave to defendant the privilege of pumping and running the waste water from its mine across plaintiffs' land; and then pleaded circumstances to show that waste water carrying sludge from the mill was not intended. *Held,* (1) that it was unnecessary to plead and avoid such contract, it being properly a matter of defense; (2) the complaint stated a good cause of action without showing grounds for, or asking relief in the nature of, reformation of the contract. *Pedelty v. Wisconsin Zinc Co.* 245

SALES.

Revocation of contract.

1. The burden of proof to show that an order for goods was revoked before its acceptance is upon the party alleging such revocation. *American Case & Register Co. v. Wetzler,* 168
2. The evidence in this case is *held* not to show that defendant revoked an order for goods before its acceptance by the plaintiff. *Ibid.*

Warranties: Breach.

3. In an action for the purchase price of a piano, a finding by the jury that there was a breach of a warranty against defects is *held* to be sustained by the evidence. *F. G. Smith Piano Co. v. Buschek,* 217

SCHOOLS AND SCHOOL DISTRICTS.

1. As a general rule a writ of *certiorari* to review the proceedings of a town board in such a matter as the creation of a new school district should not be granted after the expiration of two years after such proceedings are had. *State ex rel. Grotegut v. Wuensch,* 218
2. The state superintendent has no authority, upon an appeal from an order creating a new school district, to determine the question of the jurisdiction of the town board to make the order; and pendency of such an appeal is not sufficient to excuse a delay of nearly three years in applying for a writ of *certiorari* to review the proceedings of a town board on the ground that there were jurisdictional defects therein. *Ibid.*
3. Upon an application for the writ under such circumstances, where it appears that the people of the new district, in reliance upon the action of the town board, have maintained a school, collected school taxes, received an apportionment of state tax, and taken steps to acquire a site and contracted for a school house, and there is no showing that the writ is necessary to prevent injustice, it is *held* that there are no equitable grounds for making an exception to the rule limiting the issuance of such writ to two years. *Ibid.*

SEALS. See CONTRACTS, 3.

SERVANTS. See MASTER AND SERVANT. NEGLIGENCE, 1, 4.

SIDEWALKS. See DAMAGES, 7. MUNICIPAL CORPORATIONS, 16–19.

SPECIAL ASSESSMENTS. See MUNICIPAL CORPORATIONS, 12, 13, 16–32.

SPECIAL PROCEEDING. See ABATEMENT AND REVIVAL, 1. COURTS, 8. DEPOSITIONS, 1.

SPECIAL STATUTES. See REGISTER OF DEEDS, 3.

SPECIAL VERDICT. See APPEAL, 5, 14. CONTRACTS, 5. NEGLIGENCE, 3. TRIAL, 12–21.

SPECIFIC PERFORMANCE. See PARTIES, 1.

STATE BOARD OF CONTROL. See INSANE PERSONS.

STATE GRAIN COMMISSION. See OFFICERS, 1–10.

STATE HOSPITAL. See INSANE PERSONS.

STATE SUPERINTENDENT. See SCHOOLS AND SCHOOL DISTRICTS, 2.

STATUTES.

Constitutionality. See CONSTITUTIONAL LAW. CORPORATIONS, 1, 2. COURTS, 21. MUNICIPAL CORPORATIONS, 22. NAVIGABLE WATERS, 1. OFFICERS, 1, 3, 11. TAXATION, 1–19.

Special statutes. See REGISTER OF DEEDS, 3.

Mandatory or directory? See OFFICERS, 4.

Retroactive statutes. See TAXATION, 14.

Revision and re-enactment. See STATUTES, 6.

Repeal. See CORPORATIONS, 1, 2.

Construction. See ABATEMENT AND REVIVAL, 3. APPEAL, 1, 5, 15. CONSTITUTIONAL LAW, 4, 5. COSTS, 1. COUNTIES, 2. COURTS, 9, 21. DEPOSITIONS. EMINENT DOMAIN, 4. INSTRUCTIONS TO JURY, 5. INSURANCE, 3, 5. INTOXICATING LIQUORS, 1. MASTER AND SERVANT, 6–8, 20. MORTGAGES. MUNICIPAL CORPORATIONS, 4, 11, 13, 14, 16, 22, 28–32. NAVIGABLE WATERS, 2, 5–8. OFFICERS, 1, 2, 5, 8, 12. PARTIES, 1. PLEADING, 5–7. PUBLIC UTILITIES, 1, 3, 7, 8, 16, 20. RAILROADS, 12, 13. REGISTER OF DEEDS. TAXATION, 2, 4, 5, 15, 16, 18–22, 24, 25. TOWNS, 1. TRIAL, 14, 22, 27. USURY. VENUE, 1, 2.

1. Judicial construction of a statute is legitimate only where there is real obscurity in the meaning thereof. *Abbot v. Milwaukee.* 26

2. As applied to a statute imposing an extraordinary tax burden upon a person or his property, the rule of strict construction does not require, where obscurity exists, that a meaning which will defeat the effort to impose the tax should be adopted if possible or if reasonable from any viewpoint. It means only that if there are two or more reasonable meanings within the scope of the words, giving rise to uncertainty as to which was intended, that one which does not impose the burden should be taken rather than one which does; but if, after all, the latter is more reasonable than the former, it is to be accepted as speaking the legislative intent. *Ibid.*

3. Upon a question of statutory construction precedents are an unsafe and unsatisfactory guide, because they rarely present precisely similar language relating to the same subject matter and in the same connection and surroundings. *Nordean v. Minneapolis, St. P. & S. S. M. R. Co.* 627

4. Consideration of the purpose and object of the statute is a recognized aid to interpretation if, after examining the statute itself and applying it to the subject matter regulated thereby, there still exists an ambiguity. *Ibid.*

5. But if a statute standing by itself, without resort to rules of interpretation, conveys a definite and clear impression when applied to the subject regulated, that is the best evidence of its meaning. *Ibid.*

6. The rule that dropping words out of a statute in a revision and re-enactment thereof indicates an intent to change the statute in that respect, cannot prevail against the plain meaning of the statute as rewritten, whether such words be simply omitted or a new form of expression be substituted therefor. *Ibid.*

STIPULATIONS. See VENUE, 5.

STREET RAILWAYS.

Operation: Injuries to passengers. See NEGLIGENCE, 5. RAILROADS, 1–7.

1. In an action against a street railway company for personal injuries, plaintiff having testified to facts showing that she was a passenger, the negative testimony of several conductors to the effect that they did not see or remember anything of such an accident, did not raise any issue for the jury as to whether or not she was a passenger; and the fact that in his charge the trial judge spoke of her as a passenger was not such an error as warranted the granting of a new trial. *McBride v. Milwaukee E. R. & L. Co.* 17
2. In an action for injury to a passenger who, while riding upon the step of the rear platform of an electric car, collided with a pole beside the track, the acts of negligence charged were failure to provide sufficient seating capacity and placing the poles too near the track. The jury found that the negligence which proximately caused the injury consisted in failure of the conductor (1) to discover and remove plaintiff from the step before the car started, (2) to inform him that he could not obtain a seat, and (3) to discover and remove plaintiff from the step after the car started and before he was injured. No amendment of the complaint was asked or ordered. *Held*, that the findings showed actionable negligence and, as the evidence on which they were based was mainly that of the conductor himself and no claim was made of surprise, a judgment on the verdict for plaintiff would not be reversed. *Tolleman v. Sheboygan L., P. & R. Co.* 197
3. Properly, in such a case, the court should order the complaint to be amended and give defendant an opportunity to make a showing of surprise, before submitting questions as to grounds of negligence not within the issues. *Ibid.*
4. The evidence in such case is *held* sufficient to warrant a finding that the conductor was negligent in failing to satisfy himself, before starting the car, that the passengers occupied safe positions. *Ibid.*
5. Plaintiff, who was seventy-five years of age, having testified that when he stepped on the car he supposed that he would be able to get into the car, that he did not intend to ride on the step, but that the car started immediately and did not again stop before he was struck by the pole, a finding that he was free from contributory negligence was sufficiently supported by the evidence. *Ibid.*
6. The swaying of the passengers in the vestibule which pushed plaintiff outward from the car, having been caused by the motion of the car, was an element of danger which the defendant should have foreseen and provided against, and cannot be regarded as an intervening efficient cause of plaintiff's injury, so as to relieve defendant from liability. *Ibid.*

Same: Injuries to travelers on streets. See INSTRUCTIONS TO JURY, 7–10.

STREETS. See MUNICIPAL CORPORATIONS, 1–34.

SUBLETTING. See LANDLORD AND TENANT, 2, 4, 5.

SUMMONS.

Omission of the signature from the copy of summons served upon defendant, where the annexed papers, served therewith, advise the defendant of the name and address of the plaintiff's attorney, is a mere irregularity and not a jurisdictional defect. *Harvey v. Chicago & N. W. R. Co.* 391

SUPREME COURT. See APPEAL. COURTS, 9–22. INJUNCTION, 3.

SURETIES. See CONTRIBUTION.

SURVEYS. See HIGHWAYS, 2.

TAXATION.

Of incomes. See COURTS, 21, 22.

1. Under sec. 1, art. VIII, Const., as amended, taxation of property and taxation of incomes are recognized as separate and distinct things, and both are permitted. *Income Tax Cases,* 456
2. The taxation of land itself and also of the income derived therefrom, as provided in ch. 658, Laws of 1911, does not violate the XIVth amendment, Const. of U. S., guaranteeing "equal protection of the laws." *Ibid.*
3. Said XIVth amendment does not lay upon the states an unbending rule of equal taxation: they may make exemptions, levy different rates upon different classes, tax such property as they choose, and make such deductions as they choose, so long as they obey their own constitutions and proceed within reasonable limits and general usage. *Ibid.*
4. The progressive feature in the taxation of incomes under ch. 658, Laws of 1911, by which the rate is graduated according to the size of the taxable income, is expressly authorized by the state constitution and is not within the inhibition of the XIVth amendment, Const. of U. S. *Ibid.*
5. Whether, under sec. 2, art. IV, Const. of U. S. (providing that the "citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"), the provisions of ch. 658, Laws of 1911, which deny to nonresidents exemptions which are allowed to residents are valid, is not determined. If invalid, their invalidity does not affect the act as a whole. *Ibid.*
6. The provision in said act which allows an assessment against a nonresident to be increased without notice, although in case of a resident notice must be given, does not violate sec. 2, art. IV, Const. of U. S. *Ibid.*
7. The office of assessor of incomes, provided for in the act, is not a county, city, town, or village office, nor is it an office which existed in substance when the state constitution was adopted or which is essential to the existence or efficiency of either of the said municipal divisions. It is therefore not covered by the guaranties of local self-government found in sec. 4, art. VI, and sec. 9, art. XIII, Const.; and under the latter section such assessors may be elected or appointed in any way the legislature may direct. *Ibid.*
8. It is not a delegation of legislative power to vest in the state tax commission, by law, the power of appointing assessors of incomes and fixing their salaries. *Ibid.*

9. A classification by which exemptions allowed to individuals are denied to partnerships is based upon substantial differences between classes, does not involve unjust discrimination, and is valid. *Ibid.*

10. So, also, a classification under which an exemption of life insurance to the amount of $10,000 is allowed to one legally dependent on the deceased, though denied to other persons, is valid. *Ibid.*

11. The provision that a taxpayer who has paid a personal property tax for the year may have the amount so paid credited upon his income tax, does not involve any invalid classification. *Ibid.*

12. Income, within the meaning of sec. 1, art. VIII, Const., as amended, need not be money, but may be that which is convertible into money; and the estimated rental of residence property occupied by the owner thereof may properly, as provided in the act, be taxed as a part of the owner's income. *Ibid.*

13. The provision that the income of a wife living with her husband shall be added to his income, and the income of each child under eighteen years of age living with its parents shall be added to that of the parents, involves a classification based on substantial differences and is valid. *Ibid.*

14. Neither the fact that incomes for the entire year 1911 are to be taxed, although the law did not go into effect until July 15th of that year, nor the fact that profits derived from the sale of property purchased at any time within three years previously are to be included, renders the law retroactive or void. *Ibid.*

15. Whether the provision (in sec. 1087*m*—22) that the income of a resident of the state derived from different political subdivisions thereof shall be combined for the purpose of determining the exemptions and the rate, while the income of a nonresident is to be separately assessed and taxed in each of the municipalities from which it is derived—thus discriminating in some instances against residents by subjecting their incomes in part to higher rates,—is in violation of sec. 2, art. IV, Const. of U. S., not determined. *Ibid.*

16. That part of sec. 1087*m*—6 which provides a rate of taxation for the incomes of corporations different from the rate prescribed for individuals, involves a classification based upon substantial differences and is valid. *Ibid.*

17. Although the act in terms includes all corporations and does not specifically except national banks nor name the officers whose salaries cannot be constitutionally taxed, that fact does not invalidate it. If national banks or any public officers cannot constitutionally be subjected to the tax the law will be construed as not applying to them. *Ibid.*

18. Whether the provisions, in sec. 1087*m*—2, under which the incomes of nonresidents are to be taxed so far as derived from sources within the state, and incomes derived from business interstate in its character are to be taxed on that portion thereof which is derived from business transacted and property located in the state (to be ascertained as therein stated), are valid, is not determined. *Ibid.*

19. Whether the provision, in sec. 1087*m*—3 (b), that a portion of the interest on corporate bonds (to be ascertained as therein

provided) shall be taxed against the bondholders, and if not paid by them shall be enforced against the corporation and may then be deducted from the next interest payment on the bonds, is valid, not determined. *Ibid.*

Exemptions. See TAXATION, 9, 10.

20. A corporation organized under ch. 86, Stats., for benevolent and educational purposes, even though organized by a religious order of the same name as the corporation and incidentally conducting religious services in a hospital maintained by it, is not a "religious corporation" within the meaning of the Superior city charter (sec. 244, ch. 124, Laws of 1891), exempting "parsonages or property owned by some religious society, association or corporation" from payment of assessments for sewers, street improvements, etc. *United States Nat. Bank v. Poor Handmaids,* 613

21. *It seems* that the term "religious corporation," as used in such charter, means a corporation organized in connection with a church under ch. 91, Stats. *Ibid.*

22. Sec. 1038, Stats., exempting property therein described "from taxation," has no reference to taxes on account of special benefits or under police regulations. *Ibid.*

23. Statutes on the subject of taxation are to be construed, where construction is permissible, strictly against exemption. *Ibid.*

Setting aside tax: Errors affecting groundwork of tax.

24. In ch. 295, Laws of 1909 (secs. 1210*h*—1 to 1210*h*—4, Stats.), the words "groundwork of the tax" refer to some serious jurisdictional defect, not mere irregularities in the details of the proceedings after jurisdiction is properly acquired; and accordingly the act does not apply to the case of a mere premature extension of an assessment upon the tax roll. *Parkes v. Milwaukee,* 84

[25. Whether ch. 295, Laws of 1909, is applicable to special assessments, doubted; whether it is valid, not determined.] *Ibid.*

Special assessments. See MUNICIPAL CORPORATIONS, 12–32.

Reassessment. See MUNICIPAL CORPORATIONS, 3, 32.

TAX COMMISSION. See TAXATION, 8.

TAXPAYERS' ACTIONS. See COURTS, 18, 19, 24.

TEMPORARY INJUNCTION. See COURTS, 6.

TENDER.

See CORPORATIONS, 5.

Tender of the purchase price of land *held* to be sufficiently pleaded. *O'Malley v. Miller,* 393

TESTAMENTARY GUARDIAN. See GUARDIAN AND WARD.

TOWNS.

Town treasurer: Default: Demand. See PLEADING, 5, 7.

1. Under subd. 6, sec. 836, Stats. (1898), and sec. 819, Stats. (Laws of 1907, ch. 55), a town treasurer is not in default, and the town board has no right to bring an action against him, by reason

of his not turning over funds of the town to his successor, until after a demand has been made therefor. *Stinnett v. Noggle*, 603

2. In an action by a town against its former treasurer a complaint alleging that defendant had unlawfully retained and converted to his own use moneys belonging to the town and had refused to turn over the same to plaintiff, is *held* sufficient to show that there had been a demand. *Ibid.*

3. An allegation in such complaint that defendant had acted as treasurer until a certain date, "when his successor was appointed and qualified, and one T. was the said person so appointed," is *held* sufficiently to allege that a successor to defendant as treasurer had been appointed and had qualified. *Ibid.*

TRESPASS.

See COSTS, 1. MUNICIPAL CORPORATIONS, 10.

In an action to recover for injury to land by the deposit of foreign material thereon and to restrain further injury, it was not erroneous, though unnecessary, to state in the judgment for plaintiffs that it was without prejudice to their right to recover for injury caused subsequent to the trial. *Pedelty v. Wisconsin Zinc Co.* 245

TRIAL.

Reception of evidence: Introduction, offer, and admission: Objections. See ANIMALS, 1, 3, 4. APPEAL, 3, 12. DAMAGES, 3. INSURANCE, 2. INTOXICATING LIQUORS, 7. MASTER AND SERVANT, 3. RAILROADS, 5. WATERS AND WATERCOURSES, 1, 2.

1. Where evidence is excluded upon a mere general objection, the ruling will be upheld on appeal if any ground in fact existed for the exclusion. In the absence of any request by the opposing party or by the court to make the objection definite, it will be assumed that it was understood and that the ruling was placed upon the right ground. *Rosenberg v. Sheahan*, 92

2. Where evidence offered is manifestly improper the court may, in its discretion, exclude the same whether objected to or not. *Ibid.*

3. Where evidence was not proper under any circumstances a general objection, though overruled, will be deemed to have been sufficient. *Ibid.*

4. A printed booklet without authentication and having nothing to indicate that it was an official publication, which was offered to prove the existence of a municipal ordinance, might, if admitted as evidence, have been treated as of no probative force whatever, or might have been excluded even if no objections thereto were made; hence its exclusion under a general objection was not error. *Ibid.*

Same: Trial by the court.

5. The free reception of improper evidence as to what was said by parties to a written contract, even in a case tried by the court, should be avoided. *Pedelty v. Wisconsin Zinc Co.* 245

Taking case or question from jury. See MASTER AND SERVANT, 6, 7, 14, 19–22. MUNICIPAL CORPORATIONS, 7, 8, 38. STREET RAILWAYS, 1.

6. Where the evidence tends to prove negligence, but contradictory inferences may also logically be drawn therefrom, the question of negligence is for the jury. *Brown v. Milwaukee E. R. & L. Co.* 98

7. The weight of evidence and the effect of alleged contradictions and impeachments are matters peculiarly within the province of the jury and not questions of law for the court. *Ruck v. Milwaukee Brewery Co.* 222

Same: Nonsuit. See MASTER AND SERVANT, 4.

Same: Directing verdict. See RAILROADS, 14–16.

8. It is the duty of the trial court, if convinced that there is no fair ground in the evidence for a determination in favor of the plaintiff, to direct a verdict for the defendant. *Jeffers v. Green Bay & Western R. Co.* 315

9. Such a decision of the trial court will not be disturbed on appeal unless manifestly wrong. Even if not right upon the ground upon which it was made, it may be right upon some other ground. *Ibid.*

Instructions to jury. See ANIMALS, 5. APPEAL, 8. DAMAGES, 1, 3. INSTRUCTIONS TO JURY. INTOXICATING LIQUORS, 4–6. MASTER AND SERVANT, 20. MUNICIPAL CORPORATIONS, 9. RAILROADS, 5. RAPE, 3. STREET RAILWAYS, 1. WATERS AND WATERCOURSES, 2.

Same: Requests for instructions. See APPEAL, 5. INSTRUCTIONS TO JURY, 3–5, 7. INTOXICATING LIQUORS, 4. RAILROADS, 1.

Verdict: Perverse verdict. See TRIAL, 12.

10. A perverse verdict is one rendered in disregard of the law as given to the jury by the court. *Parkes v. Lindenmann,* 89

11. Where the bill of exceptions does not contain any part of the charge to the jury, this court cannot say that the court below committed error in holding a verdict perverse. *Ibid.*

Same: Setting aside verdict.

12. Where the answer to one material question of a special verdict plainly shows that the jury made such answer perversely or by reason of passion or prejudice, the court may properly set the entire verdict aside, and should do so unless satisfied that the answers to the other questions were not affected by such perversity, passion, or prejudice. *State Journal Printing Co. v. Madison,* 396

Special verdict. See APPEAL, 5, 14. CONTRACTS, 5. NEGLIGENCE, 3. TRIAL, 12.

13. A mistake whereby the wrong belt was designated in a question submitted for special verdict was immaterial where there was no doubt which belt was meant and the jury was evidently not misled. *Kruck v. Wilbur Lumber Co.* 76

14. Where the trial court refused defendant's request to have a certain issue submitted to the jury, it cannot be deemed to have found such issue in favor of plaintiff, under sec. 2858*m*, Stats. (Laws of 1907, ch. 346), by ordering judgment in his favor. *Ibid.*

15. A question in a special verdict, "Did any want of ordinary care on the part of the plaintiff proximately contribute to the *damages* which he has sustained?" was faulty and improper, the proper inquiry being whether such want of care proximately contributed to his *injury*. *Brown v. Milwaukee E. R. & L. Co.* 98

16. The court may properly refuse to submit for special verdict proposed questions which relate to merely evidentiary matters and which, so far as they relate to ultimate issuable facts, are covered by other questions. *Mickuczauski v. Helmholz M. Co.* 153

17. Thus, it was not error in this case to refuse to submit a question requiring the jury to answer specifically which one of several alleged defects in the machine was the cause of the beam falling down upon the die, where the court properly submitted the ultimate question whether such irregular movement was habitual, *i. e.* whether the machine was liable to get into such condition that while being operated the beam would sometimes come down to the die without pressure being applied to the treadle. *Ibid.*

18. Questions submitted for special verdict should not be separated into subsidiary inquiries as to mere evidentiary matters. Only special questions covering the issues made by the pleadings and controverted on the evidence, each so framed as to cover a single issue and admit of a direct answer, should be included. *Wolff v. Carstens,* 178

19. The defendant cannot complain of the refusal of the trial court to submit questions proposed for special verdict in so far as such refusal constitutes, in effect, a ruling that the evidence upon such questions is insufficient to sustain any claim of the plaintiff. *Ruck v. Milwaukee Brewery Co.* 222

20. Rejection of questions proposed for special verdict is not error where the matters embraced therein are fully covered by the questions which are submitted. *Ibid.*

21. It was not error to refuse to submit for special verdict a question as to a fact not specifically pleaded, bearing upon the plaintiff's contributory negligence, where the charge dealing with that subject practically covered the same ground. *Vogel v. Herzfeld-Phillipson Co.* 573

Trial by court: Findings of fact.

22. Sec. 2863 of the Code should be reasonably followed below, in the circumstances stated therein, by a decision stating "separately all the facts found." *Calumet Service Co. v. Chilton,* 334

23. "Facts" means pleadable facts. *Ibid.*

24. "Separately" refers to pleadable or pleaded facts, each being required to be covered by a finding confined thereto. *Ibid.*

25. A decision under sec. 2863 of the Code should contain one finding for each actually, or in effect, pleaded fact, upon which the parties depend, phrased in concise, clear, judicial language, avoiding repetition, elaboration, discussion, and evidence or evidentiary facts or circumstances. *Ibid.*

26. Compliance with the Code, as indicated, is to be striven for, to minimize unnecessary judicial labor, raise the grade of it, increase judicial efficiency, and promote economy and certainty in the administration of justice. *Ibid.*

Same: Agreed case: Conclusions of law.

27. Where a controversy is submitted without action, pursuant to sec. 2788, Stats. (1898), no conclusion of law is necessary and the judgment determines both facts and law in favor of the party for whom it is rendered. *Hoff v. Hackett,* 32

28. Upon an appeal in such a case the appellate court considers only the question whether there is in the stipulated facts sufficient to support the judgment. *Ibid.*

TROVER. See CONVERSION.

TRUSTS AND TRUSTEES.

Creation of trust. See GUARDIAN AND WARD. WILLS, 6.

1. No particular form of words, and not even the use of the words "trust" or "trustee," is necessary to create a trust; and, on the other hand, the use of those words does not necessarily show an intention to create one. *Otjen v. Frohbach,* 301

2. To create a valid trust the intent so to do must be clear and the writing employed must be reasonably certain in respect to the subject matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of their interests, and the manner in which the trust is to be performed. *Ibid.*

Management of trust property: Co-trustees: Authority of managing trustee: Evidence.

3. The authority of one of two testamentary trustees to act for and bind the other in the management and leasing of real estate may be established by the direct testimony of such managing trustee as to the authority given him, coupled with proof of acquiescence and assent on the part of the other in his acts. *Katz v. Miller,* 63

Accounting.

4. Where a trustee, or a person charged with the duty of investing a fund for the purpose of accumulations, fails to show, when properly called upon to account, what the actual gains have been, the usual gains with annual rests will be charged him. *Hazelton v. New York Life Ins. Co.* 19

UNGUARDED MACHINERY. See MASTER AND SERVANT, 6–8, 20. NEGLIGENCE, 1.

USURY.

Sec. 1691 Stats. (Laws of 1907, ch. 412), relating to usury, is a valid enactment. *Fahringer v. State,* 291

VENDOR AND PURCHASER OF LAND. See CONTRACTS, 1. PARTIES.

VENUE.

1. Where, under subd. 6, sec. 2619, Stats. (1898), the county in which the sole defendant resided was the only proper place of trial of an action, a demand by him that the trial be had within said county, naming it, "for the reason that the said defendant, at the time of the commencement of the action and for many months prior thereto, resided and still resides in such county," was sufficient under sec. 2621, although it did not in terms state

that said county was "the proper county." *Anderson v. Arpin H. L. Co.* 131 Wis. 34, distinguished. *State ex rel. Bessie v. Halsey,* 171

2. Where a change of venue is had in any action, the county in which the action is tried cannot, under sec. 2940, Stats. (Supp. 1906: Laws of 1905, ch. 254), charge back the expenses of trial against any county other than the one in which the action was commenced; and not against that county if the change therefrom was made because the action was not properly brought therein. *Portage County v. Columbia County,* 329

3. Thus, where an action was brought in one county and the venue changed to another because the first county was not the proper place of trial, and thereafter the venue was again changed by stipulation to a third county, in which the action was tried, such third county cannot charge back the expenses of the trial against either of the other counties. *Ibid.*

4. It cannot be held in such a case that the word "commenced" in the statute means *properly* commenced and that the action was not properly commenced until it reached the second county on change of venue,—such construction being negatived by the statute itself. *Ibid.*

5. A stipulation by the parties that an action pending in the circuit court for one county shall be tried in another county in the same circuit with like effect as if tried in the county first mentioned, is valid and binding, where the circuit court has jurisdiction of all questions of that nature, the stipulation having the effect only to waive the rights of the parties to have the case tried within the first county and before a jury thereof. *Junek v. Buzzelli,* 610

VERDICT. See TRIAL, 8–21.

VIADUCTS. See MUNICIPAL CORPORATIONS, 2–10.

WAIVER. See APPEAL, 15. EMINENT DOMAIN, 6. GUARDIAN AD LITEM. LANDLORD AND TENANT, 1–3. MUNICIPAL CORPORATIONS, 22, 23, 25, 27. RAILROADS, 9. VENUE, 5.

WAREHOUSEMEN. See RAILROADS, 20.

WARNING of dangers. See MASTER AND SERVANT, 13–18, 23.

WARRANTY. See SALES, 3.

WATER POWERS. See CONSTITUTIONAL LAW, 5–10. CORPORATIONS, 2. INJUNCTION, 2. NAVIGABLE WATERS, 5–8.

WATERS AND WATERCOURSES.

Natural lakes and ponds. See NAVIGABLE WATERS, 1–4.

Dams: Flowage: Damages. See CONSTITUTIONAL LAW, 8–10. CORPORATIONS, 2. INJUNCTION, 2. NAVIGABLE WATERS, 5–8. PLEADING, 1.

1. In determining the damage to land from the flooding of a part thereof by means of a dam, evidence of the profits of a business theretofore conducted on the land is not competent to establish the market value of the land; but evidence of the adaptability of the land to business purposes is admissible and proper to be considered. *Van Wie v. Southern Wis. P. Co.* 410

2. The lands flooded in this case were of an unusual character, being located at the broadening of a ravine or canyon of scenic

beauty, frequented by tourists, and improved by a building which had been used as a restaurant, boarding house, etc. The witnesses testifying as to the value of the land took into consideration that the business conducted there would produce an income, but, although they did not use the words "profits" and "income" with strict nicety, did not base their estimates of value on the actual profits that had been or were expected to be realized from such a business. The court explicitly instructed the jury to find as the measure of damages the difference, if any, in the market value of the property before and after flowage, and told them that they could not allow any sum for any injury to the business conducted on the land, and that in fixing the market values they could not assess any sum for remote or speculative values or consider any speculative or remote use to which the property might be put. *Held*, that there was no error prejudical to the defendant in the admission of such testimony and submission thereof to the jury. *Ibid.*

3. An award of $4,500 for the injury to plaintiffs' land by the flowage thereof is *held* not excessive as a matter of law. *Ibid.*

WATERWORKS. See MUNICIPAL CORPORATIONS, 35–39.

WILLS.

Requisites and validity: Revocation.

1. The presumption of destruction *animo revocandi* which arises when a will cannot be found after the death of the testator, is one which may be overcome by evidence, the burden of proof being on the proponent. *Wendt v. Ziegenhagen*, 382

2. The evidence in this case (stated in the opinion) is *held* to sustain findings by the jury and by the circuit court that the testator did not destroy his will or cause it to be destroyed with the intention of revoking it. [Whether findings to the effect that the will was destroyed or suppressed by his widow and son, or by one of them, are sustained by the evidence, not determined.] *Ibid.*

Probate: Ancient records: Presumption of regularity: Notice of hearing: Service.

3. After the lapse of sixty years, and upon proof that the records of the probate court were carelessly and imperfectly kept at the time of the transactions in question, and upon evidence showing other proceedings in the same matter, it is presumed, in support of a title founded on an executor's deed, that the probate judge knew the law and did in fact appoint a guardian *ad litem* for minor heirs before admitting the will to probate, and did enter an order requiring the executor to file a bond before entering upon the duties of his trust, and duly issued letters testamentary to him after he had qualified, and that the proceedings in the probate court were regular, although these facts did not appear from the records or files of that court produced at the trial. *Chandler v. Munkwitz Realty & Inv. Co.* 5

4. Sec. 18, ch. 66, R. S. 1849, did not require personal service of notice on the parties in interest of the hearing upon an application to admit a will to probate, but service by publication was sufficient; and under sec. 19 the will might be proved, in the absence of a contest, by the testimony of one of the subscribing witnesses. *Ibid.*

Construction. See GUARDIAN AND WARD.

5. While adjudicated cases are sometimes helpful upon a question of testamentary construction, the guiding principle must always be to ascertain and enforce the intent of the testator as gathered from the particular will to be construed. *Otjen v. Frohbach,* 301

6. Testatrix, divorced from her husband and having the custody of their minor son and daughter, after making some small bequests, gave all the rest and residue of her property, real and personal, to said children, or to the survivor of them, share and share alike, during their natural lives and the life of the survivor, with the right to use and consume such part of his or her share as either of them should find necessary,—with remainders over. *Held,* that the children took a life estate with power to control and dispose of the property unincumbered by any trust. *Ibid.*

7. The power to "use and consume," declared in the will, gives the right to use the *corpus* of the estate and necessarily carries with it the power to sell the personal estate absolutely and convey the fee of the real estate, together with the right to the possession and control of both. *Ibid.*

WITNESSES. See APPEAL, 1. EVIDENCE, 2–4. RAPE, 2.

WORDS AND PHRASES.

Alteration of grade of street. See MUNICIPAL CORPORATIONS, 6.
Baggage. See RAILROADS, 18.
Commenced, in statute. See VENUE, 4.
Contract, in statute. See MUNICIPAL CORPORATIONS, 11.
Directly or indirectly to or for the public, in statute. See PUBLIC UTILITIES, 9.
Ensuing year, in resolution. See REGISTER OF DEEDS, 1.
Exception, in statute. See MUNICIPAL CORPORATIONS, 3.
Facts, in statute. See TRIAL, 23.
Franchise, in statute. See PUBLIC UTILITIES, 10.
Gearing, in statute. See MASTER AND SERVANT, 7.
Groundwork of the tax, in statute. See TAXATION, 24.
Income, in constitution. See TAXATION, 12.
Indeterminate permit, in statute. See PUBLIC UTILITIES, 11, 12, 18, 27.
Monopoly. See PUBLIC UTILITIES, 19.
Operate, in statute. See RAILROADS, 13.
Proviso, in statute. See MUNICIPAL CORPORATIONS, 3.
Public utility, in statute. See PUBLIC UTILITIES, 7.
Religious corporation, in statute. See TAXATION, 20, 21.
Separately, in statute. See TRIAL, 24.
Shafting, in statute. See MASTER AND SERVANT, 7.
Special proceeding, in statute. See DEPOSITIONS.
Tavern keeper or other person, in statute. See INTOXICATING LIQUORS, 1, 2.
Taxation, in statute. See TAXATION, 22.
Use and consume, in will. See WILLS, 7.
Utility. See PUBLIC UTILITIES, 7.
Waste water from their mine, in contract. See PLEADING, 3.
Year 1902, in resolution. See REGISTER OF DEEDS, 1.

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